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une 5, 1985

Title: United States Department of the Treasury, Bureau of  
Alcohol, Tobacco and Firearms, appellant  
v.  
Anthony J. Galioto

Court: United States District Court  
for the District of New Jersey

Counsel for appellant: Solicitor General

Counsel for appellee: Casale, Michael A.

entry	Date	Note	Proceedings and Orders
1	Apr 24 1985		Application for extension of time to docket appeal and order granting same until June 5, 1985 (Brennan, April 25, 1985).
2	Jun 5 1985	G	Statement as to jurisdiction filed.
3	Jul 17 1985		DISTRIBUTED. September 30, 1985
4	Aug 9 1985	P	Response requested. (Due September 6, 1985 - NONE RECEIVED)
6	Aug 29 1985		Order extending time to file response to jurisdictional statement until October 7, 1985.
7	Oct 7 1985		Motion of appellee Anthony J. Galioto to affirm filed.
8	Oct 9 1985		REDISTRIBUTED. November 1, 1985
9	Oct 7 1985	X	Brief amicus curiae of NJ Dept. of Public Advocate filed.
10	Oct 7 1985	X	Brief amicus curiae of Coalition for Fundamental Rights & Equality, etc. filed.
11	Nov 4 1985		PROBABLE JURISDICTION NOTED. *****
12	Dec 16 1985		Record filed.
14	Dec 20 1985		Order extending time to file brief of appellant on the merits until January 2, 1986.
15	Jan 2 1986		Brief of appellant Dept. of Treasury, etc. filed.
16	Jan 9 1986		Joint appendix filed.
18	Jan 27 1986		Order extending time to file brief of appellee on the merits until February 10, 1986.
19	Feb 4 1986		SET FOR ARGUMENT, Wednesday, March 26, 1986. (1st case)
20	Feb 10 1986		Brief amicus curiae of American Psychological Association filed.
21	Feb 10 1986		Brief amicus curiae of NJ Dept. of Public Health Advocate, et al. filed.
22	Feb 10 1986		Brief of appellee Anthony J. Galioto filed.
23	Feb 10 1986		Brief amicus curiae of Coalition for Fundamental Rights & Equality, etc. filed.
24	Feb 18 1986		CIRCULATED.
25	Mar 19 1986	X	Reply brief of appellant Dept. of Treasury, etc. filed.
26	Mar 26 1986		ARGUED.



**JURISDICTIONAL**

**STATEMENT**

84-1904

No.

Office - Supreme Court, U.S.

FILED

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ALEXANDER L. STEVENS

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
APPELLANT

v.

ANTHONY J. GALIOTO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

**JURISDICTIONAL STATEMENT**

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## QUESTIONS PRESENTED

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, prohibits several categories of persons, including felons and individuals who have been committed to mental institutions, from receiving, transporting or shipping firearms in interstate commerce. Title IV also empowers the Secretary of the Treasury to grant relief from these disabilities to certain felons. The questions in this case are:

1. Whether Title IV violates the equal protection and due process components of the Fifth Amendment by imposing firearms disabilities on persons who have been committed to mental institutions without making administrative relief from those disabilities available to such persons.

2. If so, whether the district court erred in remedying the constitutional violation by invalidating all of Title IV's restrictions on the acquisition of firearms by persons who have been committed to mental institutions, rather than by either expanding or nullifying only the administrative relief provision.

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## In the Supreme Court of the United States

OCTOBER TERM, 1984

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 No.

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APPELLANT

v.

ANTHONY J. GALIOTO

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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## JURISDICTIONAL STATEMENT

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 OPINION BELOW

The opinion of the district court (App., *infra*, 1a-22a) is reported at 602 F. Supp. 682.

## JURISDICTION

The judgment of the district court (App., *infra*, 23a) was entered on February 7, 1985. A notice of appeal (App., *infra*, 24a) was filed on March 7, 1985. On April 25, 1985, Justice Brennan extended the time for docketing the appeal through June 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

(1)



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in App., *infra*, 25a-28a.

### STATEMENT

1. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968 (Gun Control Act), 18 U.S.C. 921 *et seq.*, prohibits any individual who "has been adjudicated as a mental defective or has been committed to any mental institution" from receiving, transporting or shipping a firearm or ammunition in interstate commerce (18 U.S.C. 922(g)(4) and (h)(4)), and makes it unlawful for a federal firearms licensee knowingly to sell a gun to such a person. 18 U.S.C. 922(d)(4). Title IV also imposes identical disabilities on several other categories of persons, including those who have been convicted of a felony.<sup>1</sup> Similarly, the partially overlapping provisions of Title VII of the Gun Control Act ("Title VII"), 18 U.S.C. App. 1201 *et seq.*, prohibit several categories of persons—including felons and persons who "ha[ve] been adjudged by a court \* \* \* of being mentally incompetent" (18 U.S.C. App. 1202(a)(1) and (3))—from lawfully receiving, possessing or transporting firearms.<sup>2</sup>

<sup>1</sup> The other enumerated categories are fugitives from justice (18 U.S.C. 922(d)(2), (g)(2) and (h)(2)) and persons who are users of, or addicted to, certain drugs. 18 U.S.C. 922(d)(3), (g)(3) and (h)(3).

<sup>2</sup> Also subject to disabilities under Title VII are convicted felons (18 U.S.C. App. 1202(a)(1)); persons who have been discharged from the armed forces under dishonorable

Title IV also, in limited circumstances, empowers the Secretary of the Treasury (and through him his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF)) to lift the disabilities imposed by Titles IV and VII on certain convicted felons. Under 18 U.S.C. 925(c), a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year may apply to the Secretary for administrative relief; the Secretary may grant the application if he is satisfied "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* Such relief is not available, however, to felons convicted of crimes "involving the use of a firearm or other weapon or a violation of [18 U.S.C. 921-928] or of the National Firearms Act." 18 U.S.C. 925(c).

2. On May 11, 1971, appellee "suffered an acute mental breakdown" (App., *infra*, 3a) and voluntarily entered a mental hospital in Summit, New Jersey. He was diagnosed as having experienced "an acute schizophrenic episode with paranoid features" (*ibid.*). Some three weeks later, after he expressed his intention to leave the hospital within 72 hours, appellee was committed upon the application of his physician (*ibid.*).<sup>3</sup> Appellee was discharged from the

conditions (18 U.S.C. App. 1202(a)(2)); persons who have renounced United States citizenship (18 U.S.C. App. 1202(a)(4)); and aliens illegally present in the United States (18 U.S.C. App. 1202(a)(5)).

<sup>3</sup> Appellee's commitment required a judicial finding that there "exist[ed] in the patient a diagnosed mental illness of such degree and character that the person, if discharged,

hospital five days later, on June 4, 1971, upon a finding that his condition had improved (*ibid.*).

On April 27, 1981, appellee obtained a firearms purchaser identification card pursuant to New Jersey law.<sup>4</sup> Over a year later, in October 1982, a federally-licensed firearms dealer refused to sell appellee a gun after appellee acknowledged that he once had been committed to a mental institution. App., *infra*, 4a. Appellee then applied to BATF under 18 U.S.C. 925 (c), seeking relief from the disability that followed from his commitment. He included a statement from his physician certifying that he "was no longer suffering from any mental disability that would interfere with his handling of firearms" (App., *infra*, 4a). On April 13, 1984, BATF denied appellee's application, explaining that he remained "'subject to Federal firearms disability because of his commitment'" (*id.* at 5a (citation omitted)).

3. Plaintiff then brought this suit in the United States District Court for the District of New Jersey, arguing that the disability provisions of the federal firearms laws are unconstitutional because they make administrative relief available to felons but not to persons who have been committed to mental institutions. The court accepted this contention, invalidat-

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[would] probably imperil life, person or property." N.J. Stat. Ann. § 30:4-48 (West 1981).

<sup>4</sup> Such a card, which in New Jersey must be obtained prior to the purchase of a firearm, may not be issued to a person "who has ever been confined for a mental disorder \* \* \* unless [he] produce[s] a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms." N.J. Stat. Ann. § 2C:58-3.c.3 (West Supp. 1984-1985).

ing as inconsistent with the Fifth Amendment's equal protection and due process guarantees the provisions of Title IV that deny persons who have been committed the opportunity to obtain firearms.<sup>5</sup>

The court began its equal protection analysis by concluding that "persons with histories of mental illness are a quasi-suspect class deserving of intensified 'intermediate' scrutiny," so that "any statute treating them differentially must be related to a 'substantial' government interest" (App., *infra*, 9a). After reaching this conclusion, however, the court expressly declined to rest its holding on the application of such a test (*id.* at 12a), finding instead that the challenged provisions were wholly irrational.

In making this determination, the court first opined that of all the persons affected by the federal firearms laws, "only ex-convicts and former psychiatric patients are classed according to a *past* occurrence in their lives" (App., *infra*, 15a (emphasis in original)). And because Section 925(c) permits convicted felons to overcome the statutory disabilities, the court concluded, "out of all the categories of individuals disabled from purchasing firearms, only the former mental patients are permanently disabled on the basis of a past event \* \* \* with no opportunity to establish that, in fact, they are now capable of safe handling" (App., *infra*, 15a-16a (footnote omitted)).

The court then found that this distinction between felons and former mental patients is irrational, explaining that "if anything, the bar would be more

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<sup>5</sup> Although appellee's complaint noted that he was subject to disabilities under Title VII as well as under Title IV, the district court's opinion does not discuss Title VII and the court's order does not invalidate Title VII's disability provisions. The court did not explain the reason for this omission.



logically applied to convicts than to former mental patients, rather than vice versa" (App., *infra*, 16a). Several factors contributed to this conclusion: "the bar has a punitive aspect" (*ibid.*); felons have demonstrated that they are capable of criminal activity; and a patient is unlikely to appeal his commitment after he is discharged, "so the propriety of the original commitment may never be fully explored" (*id.* at 17a). The court also noted that commitment proceedings have fewer procedural protections than do criminal trials, adding that appellee had cited studies showing that such proceedings "are replete with erroneous factual findings" (*ibid.*). The court therefore found that the distinction drawn by the federal firearms laws between felons and mental patients must have been based upon outdated notions that "ignore[] expanding knowledge about the cause of mental illnesses, their reversibility and treatment" (*id.* at 18a).

The court also added an alternative holding: that the challenged provisions violate due process standards because they deny "former mental patients the opportunity to establish that they no longer present the danger against which the statute was intended to guard" (App., *infra*, 18a). This factor "in effect creates an irrebuttable presumption that one who has been committed, no matter what the circumstances, is forever mentally ill and dangerous" (*ibid.*). The court found the use of such a presumption irrational because, "without any good faith extrinsic justification \* \* \* it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed" (*id.* at 19a).

The court acknowledged that statutes generally prohibiting former mental patients from purchasing firearms are not irrational (App., *infra*, 21a) and that such regulations serve "a legitimate, indeed substantial, state objective" (*id.* at 18a). But the court held that such prohibitions are both irrational and unconstitutional if they do "not include some provision for the granting of relief from disability to former mental patients in appropriate cases" (*id.* at 21a). Because the court believed that it lacked the competence to make administrative relief available to appellee, it simply declared unconstitutional "those provisions of 18 U.S.C. § 921 *et seq.* which have been used to deprive [appellee] of his ability to purchase a firearm" (*ibid.*).

#### THE QUESTION IS SUBSTANTIAL

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted as a central portion of the congressional effort to curb the "real[,] \* \* \* urgent and \* \* \* increasing" problem of firearm abuse. S. Rep. 1097, 90th Cong., 2d Sess. 78 (1968). It serves this purpose through the use of general prophylactic rules designed "broadly to keep firearms away from \* \* \* persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218 (1976). By invalidating Title IV's restrictions on the acquisition of firearms by potentially unstable persons—and by doing so in a way that permits even a demonstrably incompetent or insane individual to obtain a gun—the district court's decision substantially frustrates the congressional purpose, with serious consequences for public safety. Because the decision below misconceives the nature of the federal firearms statutes and

misstates the role of the courts in addressing Fifth Amendment challenges to congressional legislation, plenary review by this Court is warranted.

1. a. At the outset, the district court's holding that the challenged provisions of Title IV lack a rational basis was grounded on a misconception of the relevant statutory scheme. Despite the court's suggestion to the contrary, persons with a history of commitment<sup>6</sup> are not the only ones subjected to permanent disabilities by the firearms laws. Instead, Title IV presents "a carefully constructed package of gun control legislation" (*Scarborough v. United States*, 431 U.S. 563, 570 (1977)) that, in combination with Title VII,<sup>7</sup> is designed to keep firearms out of the hands of several "categories of presumptively dangerous persons." *Lewis v. United States*, 445 U.S. 55, 64 (1980). See *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 112 n.6, 119 (1983). In addition to individuals with a history of commitment, these provisions impose lifetime firearms disabilities on felons who commit firearms violations or crimes involving the use of a weapon (18 U.S.C.

<sup>6</sup> For convenience, the phrase "persons with a history of commitment" will be used to refer to all of the categories of persons described in 18 U.S.C. 922(d)(4), (g)(4) and (h)(4), and 18 U.S.C. App. 1202(a)(3)—that is, persons who have been "adjudicated as a mental defective," "committed to a mental institution," or "adjudged \* \* \* mentally incompetent."

<sup>7</sup> Title VII was intended to "complement" Title IV (*United States v. Bass*, 404 U.S. 336, 342 (1971)); the Court accordingly has "treated Titles VII and IV as *in pari materia*." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 117 (1983). See generally *United States v. Batchelder*, 442 U.S. 114, 120 (1979).

922(d)(1), (g)(1) and (h)(1), 18 U.S.C. App. 1202(a)(1)), persons who are discharged from the armed forces under dishonorable circumstances (18 U.S.C. App. 1202(a)(2)), and individuals who renounce American citizenship (18 U.S.C. App. 1202(a)(4))—groups linked to one another by the congressional judgment that each contains significant numbers of "especially risky people." *United States v. Bass*, 404 U.S. 336, 345 (1971).

As the district court itself acknowledged, the inclusion on this list of persons with a history of commitment cannot be labeled irrational. It seems plain that "[n]o one can dispute the need to prevent \* \* \* mental incompetents \* \* \* from buying, owning, or possessing firearms." *Huddleston v. United States*, 415 U.S. 814, 828 (1974), quoting 114 Cong. Rec. 21784 (1968) (remarks of Rep. Celler). And given this Court's judgment that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach" (*Addington v. Texas*, 441 U.S. 418, 430 (1979)), a history of commitment serves as a reasonable trigger for Title IV's restrictions. Cf. *Lewis*, 445 U.S. at 66 ("Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."); *New Banner*, 460 U.S. at 120.

b. In finding the challenged provisions irrational, the district court accordingly focused its attention not on Title IV's basic restrictions, but rather on 18 U.S.C. 925(c), which makes administrative relief from the lifetime disabilities available to certain felons. Again, however, the district court overstated the extent to which persons with a history of commitment are accorded differential treatment. Section 925(c) does not grant *all* felons rights that are with-



held from former mental patients: the relief provision is a narrow one that generally excludes the felons who most clearly pose a risk of dangerous behavior—that is, those who have committed firearms offenses or crimes involving weapons.<sup>8</sup> See *New Banner*, 460 U.S. at 117.

Section 925(c) does make relief available to the presumptively less dangerous category of felons who committed weaponless crimes, while Congress did not create in Title IV a parallel administrative mechanism that would attempt to identify and provide equivalent relief to nondangerous persons with a history of commitment. But this distinction appears to

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<sup>8</sup> The legislative history confirms the relatively narrow scope that Congress envisioned for Section 925(c). The Federal Firearms Act, ch. 850, § 2(d), 52 Stat. 1251 (repealed 1968), originally prohibited all persons convicted of a “crime of violence” from receiving a firearm, but contained no relief provision. The crime of violence limitation was deleted in 1961, and the Act’s disabilities extended to reach any person convicted of a federal felony. See Pub. L. No. 87-342, 75 Stat. 757. An administrative relief provision—the predecessor to Section 925(c)—was first enacted in 1965; it permitted the Secretary to grant relief when he believed that the applicant would “not be likely to conduct his operations in an unlawful manner.” Pub. L. No. 89-184, 79 Stat. 788. This provision was intended to afford relief to licensed firearms manufacturers who committed felonies wholly unrelated to the firearms business, and who in the absence of a relief provision would be forced out of business. See S. Rep. 666, 89th Cong., 1st Sess. 2-3 (1965). The relief provision was carried over without change as Section 925(c) of Title IV. Pub. L. No. 90-351, § 902, 82 Stat. 233. Congress subsequently substituted the current “not [be] likely to act in a [dangerous] manner” standard for the standard relating to the lawfulness of the applicant’s conduct of his business. See H.R. Conf. Rep. 1956, 90th Cong., 2d Sess. 33 (1968).

have been intentionally drawn,<sup>9</sup> and plainly was based on the congressional belief that, whatever the nature of any “subsequent curative events,” a “person [who has been committed], though unfortunate, [is] too much of a risk to be allowed firearms privileges.” *New Banner*, 460 U.S. at 116.

That risk undoubtedly is a real one. This Court has indicated that civil commitment<sup>10</sup> may be ordered only in the presence of clear and convincing evidence that the individual involved presents a danger to himself or others, a showing that presumably is satisfied only in the presence of some objective indicia of abnormality. See *Addington v. Texas*, 441 U.S. 418, 431-433 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). And once such a showing has been made, subsequent predictions about future dangerousness cannot be stated with confidence; as this Court has noted, at least “some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent

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<sup>9</sup> During the debate on Title IV it was noted that the bill did not provide relief for “those who have been committed to a mental institution who have subsequently been cured and have had their rights as citizens restored to them.” 114 Cong. Rec. 21805 (1968) (remarks of Rep. Sikes). Representative Celler, the bill’s floor manager, responded simply that “we incline to the view that a mental defective should not be permitted to ship, transport or receive a gun” (*ibid.*). Although opponents of the bill suggested “the draftsmanship of an amendment so that someone could be relieved of this disability” (*ibid.* (remarks of Rep. MacGregor)), it appears that no such amendment was offered.

<sup>10</sup> The Gun Control Act’s disabilities also apply to persons who have been found not guilty of a crime by reason of insanity. *Redford v. United States Department of the Treasury*, 691 F.2d 471, 473 (10th Cir. 1982).

acts in the future are 'fundamentally of very low reliability' " (*Estelle v. Smith*, 451 U.S. 454, 472 (1981) (citation omitted)),<sup>11</sup> a problem that may be compounded if an individual's "subsequent curative event" turns on his voluntary continuation of medication or other therapy. Cf. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 591-592 (1979). Of course, the district court may well have been correct in its view that the uncertain nature of psychiatric judgments occasionally leads to mistaken commitments. App., *infra*, 17a. See *Parham v. J.R.*, 442 U.S. 584, 612-613 (1979); *id.* at 628-629 (opinion of Brennan, J.). But Congress certainly was entitled to conclude that persons whose psychiatric problems were serious enough to have called for commitment or for an adjudication of incompetence may pose unusual risks of "becom[ing] dangerous" (114 Cong. Rec. 14773 (1968) (remarks of Sen. Long); cf. *id.* at 21829 (remarks of Rep. Bingham)) and to err on the side of caution in determining which psychiatric judgments should be given force.

In these circumstances, Congress was under no obligation to base its legislative efforts on the district court's assessment of the "expanding" body of knowledge relating to the causes and treatment of mental

<sup>11</sup> Indeed, it has been suggested that in many cases "psychiatrists show no abilities to predict accurately future violent behavior beyond that expected by chance." Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. Crim. L. & Criminology 226, 231 (1978). See also Lambert, Sherwood & Fitzpatrick, *Predicting Recidivism Among First Admissions at Tennessee's State Psychiatric Hospitals*, 34 Hosp. & Community Psychiatry 951 (1983) (recidivism risk profile developed by researchers found too inaccurate to be clinically useful).

illness (App., *infra*, 18a). To the contrary, it is the relatively uncertain and evolving nature of psychiatry that itself makes expansive restrictions on the acquisition of firearms by those with a history of commitment *necessary* to fulfill the "broad prophylactic purpose" of Title IV (*New Banner*, 460 U.S. at 118). That Congress chose not to impose equally absolute restrictions on a limited and arguably more predictable category of felons—who may be better able than those with a history of mental illness voluntarily to conform their conduct to the law's requirements—hardly makes the legislative scheme as a whole irrational. See generally *Schweiker v. Wilson*, 450 U.S. 221, 234-235 (1981); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970).

2. This conclusion—that the challenged provisions of Title IV "rationally advance[] a reasonable and identifiable governmental objective" (*Wilson*, 450 U.S. at 235)—should end the equal protection inquiry, for the district court clearly erred in its lengthy dictum on the propriety of applying "intermediate scrutiny" to the classifications at issue in this case. The district court concluded that regulations directed at "former mental patients" must be regarded as "quasi-suspect" to forestall the danger that such legislation may be grounded on "inaccurate and stereotypic fears." App., *infra*, 10a, quoting *J.W. v. City of Tacoma*, 720 F.2d 1126, 1130-1131 (9th Cir. 1983). The district court's approach, however, entirely disregards the equal protection analysis set out in this Court's decisions.<sup>12</sup>

<sup>12</sup> This Court has reserved judgment on the question "what standard of review applies to legislation expressly classifying the mentally ill as a discrete group" (*Wilson*, 450 U.S. at 231



a. While this Court has looked to a number of criteria in determining whether regulations directed at given groups should be labeled "suspect" or "quasi-suspect" (see generally *Plyler v. Doe*, 457 U.S. 202, 216-218 n.16 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973)), it invariably has held that classifications demanding heightened scrutiny have one necessary hallmark: "what differentiates [suspect classes] from \* \* \* nonsuspect statuses \* \* \* is that [a suspect] characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (footnote omitted). See *Murgia*, 427 U.S. at 313; *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *id.* at 518 (Stevens, J., dissenting). Because "for most legislative purposes there simply are no meaningful differences" between members of a suspect or quasi-suspect class and the

n.13), although several lower courts have used a rational basis test in assessing the constitutionality of statutes classifying persons on the basis of a history of institutionalization. *Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979) (rejecting attempt to preliminarily enjoin enforcement of state statute governing benefits for inmates of private mental institutions); *United States v. Jones*, 569 F. Supp. 395 (D.S.C. 1983) (rejecting equal protection challenge to 18 U.S.C. 922(h)(4)). Cf. *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y.), *aff'd*, 414 U.S. 1058 (1973) (addressing challenge to Medicare and Medicaid provisions affecting patients in psychiatric hospitals). The Ninth Circuit has held that the mentally ill do constitute a quasi-suspect class (*J.W. v. City of Tacoma*, 720 F.2d 1126 (1983)); its decision, however, was influenced by the substance of the challenged regulation—an ordinance hampering the establishment of group homes for former mental patients in residential neighborhoods—which, in the court of appeals' view, denied the affected individuals a right "essential to [their] full participation in society." *Id.* at 1129.

rest of the population (*Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring)), regulations burdening such classes "in themselves supply a reason to infer antipathy" (*Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979)), and therefore "demand close judicial scrutiny" (*Toll*, 458 U.S. at 21 (Blackmun, J., concurring)).

Regulations directed at persons with a demonstrated history of serious mental illness plainly do not fall into this category.<sup>13</sup> It is beyond dispute that "many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice," so that any differential treatment accorded such individuals will be "related, even if imperfectly, to real incapacities from which many of the mentally ill suffer." *Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979). Indeed, by definition persons whose psychological problems are serious enough to demand commitment or an adjudication of incompe-

<sup>13</sup> As a preliminary matter, it is far from clear that Title IV in fact subjects those with a history of commitment, "as a discrete group, to special or subordinate treatment." *Wilson*, 450 U.S. at 231. While Section 925(c) withholds administrative relief from such individuals, "in so doing it imposes equivalent deprivation on other groups who are not mentally ill" (450 U.S. at 231)—that is, it makes administrative relief equally unavailable to certain felons, to drug addicts, to fugitives from justice, to those dishonorably discharged from the armed forces, to individuals who have renounced United States citizenship, and to aliens illegally present in the United States. The challenged provisions thus make "a distinction not between the mentally ill and a group composed of non-mentally ill" (*id.* at 232), but between presumptively dangerous and presumptively nondangerous persons. In these circumstances, the district court erred in reading the challenged provisions in isolation as "classify[ing] directly on the basis of mental health." *Id.* at 231 (footnote omitted).

tence have exhibited instability or an inability to function in society, characteristics that undoubtedly are relevant to legislation—like Title IV—that relates to public safety.<sup>14</sup> See page 11 & note 13, *supra*. There accordingly is no reason for the courts to presume that restrictions such as those found in Title IV were inspired by an unreasoning antipathy towards the mentally ill. To the contrary, the application of such a presumption, with its concomitant heightened scrutiny, would threaten to invalidate a significant body of legislation that is based on readily articulable and self-evidently legitimate concerns.

b. While this consideration suffices to dispose of the district court's intermediate scrutiny analysis, it should be noted that the other criteria set out in this Court's equal protection decisions also militate against treatment of Title IV's classifications as quasi-suspect. The class of all present and former mental patients is not a discrete one; "mental illness covers a broad[] spectrum of disorders and is \* \* \* difficult to define." *Cleburne Living Center, Inc. v. City of Cleburne*, 726 F.2d 191, 198 n.11 (5th Cir. 1984), cert. granted, No. 84-468 (Nov. 13, 1984).<sup>15</sup> Cf.

<sup>14</sup> Similarly, given the fallibility of psychiatric diagnosis and the uncertainties concerning the causes and development of mental illness (see pages 11-12 & note 11, *supra*), a history of mental illness also is relevant to government regulation bearing on public safety. Certainly, once the presumptive relevance of an existing psychological abnormality is granted, a physician's opinion about changes in the mental state of a given patient should not affect the degree of constitutionally-mandated scrutiny accorded government classifications involving that patient.

<sup>15</sup> *Cleburne*, which currently is before the Court, presents the question whether classifications based on mental retardation must be viewed as quasi-suspect. Regardless of the

*Rodriguez*, 411 U.S. at 28. And there is no reason to believe that the general category of formerly institutionalized individuals has been "relegated to \* \* \* a position of political powerlessness." *Ibid.* Cf. *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1980) (noting that the mentally retarded often are formally excluded from participation in the political process), vacated on other grounds, 457 U.S. 307 (1982).<sup>16</sup> Because there accordingly are no special factors at work in this area that may "curtail the operation of those processes ordinarily to be relied upon to protect minorities" (*United States v. Caro-*

Court's disposition of that issue, however, there are additional, independent reasons not to adopt such a standard of review in the instant case. As noted in text—and as the *Cleburne* panel itself recognized (726 F.2d at 198 n.11)—mental illness covers a far wider range of ailments than does mental retardation. Mental illness also raises greater safety concerns than does retardation (see *ibid.*), a factor that points up the likely relevance of a history of commitment to the government's legitimate regulatory ends. And persons with a history of commitment, in contrast to the mentally retarded, generally have not been denied the right to participate in the political process. Cf. *id.* at 197-198 & n.10.

<sup>16</sup> It is undeniable that commitment to a mental institution is an event that often is misunderstood, and one that may have unfortunate and unfair social consequences for the committee. See *Addington*, 441 U.S. at 425-426. As this Court has noted, however, "what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness," rather than commitment itself. *Parham*, 442 U.S. at 601. See *id.* at 601 n.12. This consideration suggests that disparate treatment accorded those with a history of commitment is grounded more on objective considerations than on "irrational discrimination" (*Toll*, 458 U.S. at 20 (Blackmun, J., concurring)); certainly, regulations singling out such persons are of a different order than those classifying on the basis of race, religion, national origin or sex. See generally *Plyer*, 457 U.S. at 216-217 n.14.



*lene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)), there is no special call for close judicial scrutiny of restrictions affecting persons with a history of commitment.<sup>17</sup>

c. Finally, although the Court need not reach the question, it is worth adding that Title IV's restrictions would survive even elevated scrutiny, because they bear a "close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-725 (1982). The federal interest in preventing the misuse of firearms is, of course, nothing short of "urgent." *United States v. Biswell*, 406 U.S. 311, 317 (1972). See *Lewis*, 445 U.S. at 63, citing S. Rep. 1097, *supra*, at 76-78; H.R. Rep. 1577, 90th Cong., 2d Sess. 7 (1968); S. Rep. 1501, 90th Cong., 2d Sess. 22-23 (1968). This interest is directly served by the Gun Control Act's "sweeping prophylaxis" against the acquisition of firearms by "presumptively dangerous persons." *Lewis*, 445 U.S. at 63-64. And the inclusion on this list of those with a history of commitment is not "an 'accidental byproduct of a traditional way of thinking'" (*Heckler v. Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 15-16, quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)); it is, instead, grounded on objective indicia of possible instability.

The district court nevertheless suggested that Congress might have tailored Title IV's restrictions more precisely by permitting the acquisition of firearms by

<sup>17</sup> While the Court also has made use of heightened scrutiny in cases bearing on the exercise of fundamental rights (see, e.g., *Murgia*, 427 U.S. at 312-313), the opportunity to acquire a firearm has not been held to fall within this category. See *United States v. Miller*, 307 U.S. 174 (1939).

individuals with a commitment history who have demonstrated that they are not dangerous. But, as noted above, "[e]ven under the best of circumstances psychiatric diagnosis and therapy decisions are fraught with uncertainties." *Parham*, 442 U.S. at 629 (opinion of Brennan, J.). Any limitation on the broad congressional restriction—that is, any room for the application of questionable psychiatric judgments about future dangerousness—accordingly threatens to frustrate the congressional purpose. Because any mistake would have an immediate and disastrous effect on the public welfare, Congress was entitled to proceed in the gun control field with all the caution it deemed necessary.

3. There is one additional flaw in the district court's equal protection analysis: even if that court was correct in its finding that appellee has made out an equal protection violation, its choice of remedy was erroneous. The equal protection violation in this case (if one exists) plainly is not Title IV's basic restriction on appellee's opportunity to purchase a firearm; it lies, rather, in the denial of "equal treatment" to appellee that is embodied in 18 U.S.C. 925(c)'s provision of administrative relief to certain felons but not to persons with a history of commitment. *Mathews*, slip op. 10. See App., *infra*, 16a-18a. Upon finding a violation of this sort, the district court had "two remedial alternatives." *Mathews*, slip op. 9, quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). It could have "declare[d] [Section 925(c)] a nullity and ordered that its benefits"—that is, the availability of administrative relief—"not extend to the class that the legislature intended to benefit, or it [could have] extend[ed] the coverage of the statute to include those

who are aggrieved by the exclusion." *Mathews*, slip op. 9. In choosing between these remedies, the court was obligated to "accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979) (opinion of Powell, J.). See *Mathews*, slip op. 9 n.5.

The district court, however, chose neither of these alternatives. Instead, it invalidated all of Title IV's underlying restrictions on the acquisition of firearms by those who have been committed to a mental institution or adjudicated incompetent, a ruling that makes it lawful even for individuals who *presently* are under an order of commitment to purchase a firearm. Because this action went far beyond what was necessary to correct the asserted denial of equal treatment, it was (despite the government's apparent suggestion to the contrary below) beyond the "constitutional competence" of the court. *Westcott*, 443 U.S. at 91. And even if the court's chosen remedy otherwise was within its authority to grant, that remedy—far more than either the simple extension or the outright nullification of Section 925(c)—plainly acted to "circumvent the intent of the legislature" (*Mathews*, slip op. 9 n.5, quoting *Westcott*, 443 U.S. at 94 (opinion of Powell, J.)), for Congress made clear beyond dispute its intention to keep firearms out of the hands of persons who have suffered from "mental disturbances." 114 Cong. Rec. 21829 (1968) (remarks of Rep. Bingham). See *id.* at 21780 (remarks of Rep. Sikes); *id.* at 21784 (remarks of Rep. Celler; *id.* at 21791 (remarks of Rep. Thompson); *id.* at 21835 (remarks of Rep. Gilbert); *ibid.* (remarks of Rep. Bolton); *ibid.* (remarks of Rep. Hanna); *id.* at 22251 (remarks of Rep. Scheuer); *id.* at

22270 (remarks of Rep. Fino); *ibid.* (remarks of Rep. Cohelan); *id.* at 13868 (remarks of Sen Long). In the event that this Court affirms the district court's constitutional judgment, then, it nevertheless must vacate that court's invalidation of those portions of the Gun Control Act that impose disabilities on persons with a history of commitment.

4. The district court's alternative holding, which turned on its conclusion that the challenged provisions of Title IV create a constitutionally infirm "irrebuttable presumption," is equally flawed. As this Court repeatedly has made clear, legislation that satisfies equal protection requirements "is perforce consistent with the due process requirement of the Fifth Amendment." *Weinberger v. Salfi*, 422 U.S. 749, 770 (1975), quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). The question for due process purposes therefore "is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Salfi*, 422 U.S. at 777.

The district court concluded that it was irrational for Congress to base the imposition of firearms disabilities on a psychiatric determination, while declining to lift those disabilities in response to subsequent psychiatric evidence. App., *infra*, 19a. As noted above, however, civil commitment generally can be ordered only in response to clear evidence that the individual involved presents a danger to himself or others. See page 11, *supra*. Once this showing has been made, it hardly seems irrational, given the "fal-



libility of medical and psychiatric diagnosis" (*Parham*, 442 U.S. at 609), for Congress to have concluded that such an individual poses a greater than normal risk of again "becoming a threat to society." *Scarborough*, 431 U.S. at 572, quoting 114 Cong. Rec. 14773 (1968) (remarks of Sen. Long). And if a person's psychological difficulties have proven severe enough to require commitment or an adjudication of incompetence, Congress certainly has the discretion to err on the side of safety in determining whether that individual should be accorded an opportunity to obtain a gun.

#### CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1985

#### APPENDIX A

#### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-2045

ANTHONY J. GALIOTO, PLAINTIFF

*v.*

THE DEPARTMENT OF THE TREASURY, BUREAU OF  
ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

#### OPINION

SAROKIN, District Judge

#### INTRODUCTION

In a society which persists and insists in permitting its citizens to own and possess weapons, it becomes necessary to determine who may and who may not acquire them. At issue in this matter is a statute reminiscent of the Dark Ages, which permits a person convicted of a crime to purchase a gun under certain circumstances, but denies that same right to a person once committed for mental illness no matter what the circumstances. Apparently one who has been convicted of a crime can be relieved of the stigma arising from such a conviction, but a commitment for mental illness renders one permanently disqualified. The statute thus implies that mental illness is incurable, and that those persons with a history of

mental illness who have never committed a crime are deemed more likely to commit one in the future than those persons who have actually done so in the past. If persons with criminal records are permitted to purchase and possess weapons after meeting certain standards, certainly persons who have conquered past mental illness are entitled to the same consideration and rights. To impose a perpetual and permanent ban against anyone who has ever been committed for mental illness, no matter how ancient the commitment or how complete the cure, is to elevate superstition over science and unsupported fear over equal protection and due process. Accordingly, the court finds this provision of the subject statute to be unconstitutional.

The instant motion has been brought by defendant to dismiss plaintiff's complaint or, in the alternative, for summary judgment. A party moving for summary judgment cannot prevail unless there exists no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 95 (3d Cir. 1982). When the court has determined upon undisputed facts that the non-moving party, rather than the movant, is entitled to judgment as a matter of law, "it is well within the district court's discretion to enter summary judgment for the non-moving party." *Selected Risks Ins. Co. v. Bruno*, 555 F. Supp. 590 (M.D. Pa. 1982), *rev'd on other grounds*, 718 F.2d 67 (3d Cir. 1983); *see also* 6 *Moore's Federal Practice*, ¶ 56.12 (2d ed. 1984). Such is the case here. The defendant Bureau of Alcohol, Tobacco, and Firearms (Bureau), asks the court to grant summary judgment in its favor on the grounds that the plaintiff has no entitlement to relief under

18 U.S.C. § 925(c), pursuant to which the plaintiff sues. Instead, the court finds that section 925(c) and the related statutory provisions in 18 U.S.C. § 921 *et seq.* are invalid as infringements upon the plaintiff's right to due process as guaranteed by the fifth amendment to the United States Constitution.

### FACTS

Plaintiff Anthony Galioto is a 57-year-old long-standing resident of West Orange, New Jersey. Galioto served in the Armed Forces from 1951 to 1953, was honorably discharged, and has since held a position as an engineer with the New York and New Jersey Port Authority. Plaintiff's Memorandum of Law, Exh. D. In 1971, having had no prior history of mental illness, Galioto suffered an acute mental breakdown and voluntarily entered Fair Oaks Hospital in Summit, New Jersey. Plaintiff's Mem., Exh. B. He was diagnosed as having suffered an acute schizophrenic episode with paranoid features. Galioto remained hospitalized for twenty-three days from May 11 to June 4, 1971.

During Galioto's hospital stay, when Galioto expressed his intention to leave, his physician, Dr. R.G. Alvarez, sought to have him committed. On May 31, 1971, the Essex County Juvenile and Domestic Relations Court entered a final order of commitment. Galioto was released five days later, after Dr. Alvarez determined that Galioto's condition had improved. There is no evidence that Galioto was ever again hospitalized for mental illness.

Ten years after this hospitalization, Galioto applied to the Superior Court of New Jersey, Essex County, Law Division, for an order granting him a firearms purchase identification card pursuant to



New Jersey Statute Annotated 2C:58-3(b), which order was granted on April 27, 1981. Thereafter, in October, 1982, plaintiff attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. Ray's Sport Shop refused to sell any firearm to plaintiff when he responded "yes" to a question on a standard Bureau questionnaire asking: "Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?" 18 U.S.C. § 922(d)(4) makes it unlawful for a licensed dealer in firearms "to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or had been committed to any mental institution."<sup>1</sup>

A few days after said refusal, Galioto applied to the defendant Bureau in Washington, D.C., for a release from firearms disability pursuant to 18 U.S.C. § 925(c). Papers submitted by plaintiff included a certification from Dr. Alvarez, the physician who had sought Galioto's commitment in 1971, to the effect that Galioto was no longer suffering from any mental disability that would interfere with his handling of firearms. Section 925(c), under which Galioto sought relief from his firearm disability, provides in pertinent part:

A person who has been convicted of a crime punishable for a term exceeding one year (other than a crime involving the use of a firearm or

<sup>1</sup> Another subsection of section 922, section 922(h)(4), makes it unlawful for "any person . . . who has been adjudicated as a mental defective or who has been committed to any mental institution . . . to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce."

other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition . . . of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding such conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.<sup>2</sup>

There is no equivalent provision establishing a mechanism by which a former mental patient can seek relief from the firearms disabilities imposed upon him by federal law. By letter dated April 13, 1984, the Director of the Bureau of Alcohol, Tobacco, and Firearms, Stephen E. Higgins, denied plaintiff's application for relief from firearms disability, asserting that Galioto was "subject to Federal firearms disability because of his commitment." Exhibit A to Complaint.

The Bureau argues in support of its motion that it was powerless to release Galioto from disability under section 925(c), because that section allows for a release from disability *only* for those disabled due to criminal convictions, not those disabled as a result of past commitment to a mental institution. Sections

<sup>2</sup> Firearm disabilities equivalent to those imposed on persons who have been adjudicated mentally defective or committed to a mental institution are imposed on persons who have "been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year." §§ 922(d)(1) and 922(h)(1).

922(d)(4) and (h)(4), according to the Bureau, create a permanent and irreversible disability for anyone ever committed to a mental institution, without regard to the length of the commitment, the length of the interval between the commitment and the proposed firearms purchase, the source or severity of the original illness, the improvement of the person subject to the disability, the evolution of medical knowledge about the illness for which the former patient was committed, or the propriety and correctness of the commitment in the first instance.<sup>3</sup>

## DISCUSSION

### I. *Issues of Fact*

Plaintiff has contended, in defense of this motion, that there remains a disputed issue of fact which ought to preclude summary judgment. He argues that the Director's decision to deny plaintiff relief rested on two factual determinations: "(1) that plaintiff had been committed to a mental institution and (2) that plaintiff was discharged on a determination other than a finding that he was competent." Plaintiff's Mem. at 3; also Exh. A to Complaint. Plaintiff argues that the Director would or should have released plaintiff from his disability had he found that plaintiff's commitment was "factually erroneous," that is, that plaintiff "was not mentally ill at the time of his commitment or alternatively that he was subsequently discharged based on a finding of mental competence." Plaintiff's Mem. at 5. Plaintiff does

<sup>3</sup> The court has serious doubt whether an applicant could collaterally attack such a commitment in this type of a proceeding, even if appropriate means were provided to seek relief.

not argue that his commitment was, in fact, "erroneous," but notes that it was of short duration. The Bureau maintains, on the other hand, that the fact of plaintiff's commitment alone is enough to disable him permanently, whether or not that commitment was erroneous. It notes in any event that plaintiff was prescribed medication upon his discharge, indicating that he was not wholly "competent" at that time.

The court finds no issue of fact raised here that should preclude summary judgment in favor of the plaintiff. The Bureau has taken the position that it is powerless under sections 922 and 925 to release plaintiff from his disability even if it were shown as a matter of fact that plaintiff's commitment was indeed erroneous, or for any other reason. This interpretation is entitled to some, albeit limited, deference as an indication of the intended "meaning" of the statute. *Columbia Gas Transmission Corp. v. F.P.C.*, 530 F.2d 1056, 1059 (D.C. Cir. 1976) (deference given to agency's determination of meaning of statute in light of agency expertise); *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984) ("legal interpretations by tribunals having expertise are helpful [to reviewing court]"). Moreover, the Bureau presents a plausible argument that the statute is to be read literally, relying on *Dickerson v. New Banner Institute*, 103 S. Ct. 986 (1983) (state expunction of conviction did not relieve plaintiff of firearms disability under literal terms of 18 U.S.C. §§ 921 *et seq.*, imposing disability based on fact of conviction), and that section 925 simply does not give it authority to relieve plaintiff of his disability, whatever the circumstances surrounding his commitment or thereafter. In gen-



eral, a court should avoid reaching a constitutional question when an issue can be resolved as a matter of statutory interpretation. *See, e.g., United States v. Security Industrial Bank*, — U.S. —, 103 S. Ct. 407, 411 (1982); *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Here, however, where the statutory interpretation of the agency is well-founded and where the plaintiff has not submitted evidence to demonstrate that he comes within the exception to the statute which he urges, it is not necessary to prolong these proceedings in anticipation of further proofs in order to avoid confronting the patent constitutional defect in section 921, *et seq.* The purpose of summary judgment is "to eliminate a trial in cases in which it is unnecessary and would only cause delay and expense[']" *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.), *cert. denied*, 429 U.S. 1038 (1977).

## 2. Issues of Law—The Statute's Infirmary Under the Fifth Amendment

It is well settled that the due process clause of the fifth amendment includes an equal protection component. *See, e.g., Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2180 (1984). Federal government action violates the equal protection component of the due process clause when it treats similarly situated groups differently without a substantial or compelling government interest, if the groups are suspect or "quasi-suspect" classes entitled to enhanced scrutiny, or a fundamental right is involved, or if it acts without a rational basis, where the groups are not suspect classes and no fundamental right is implicated. *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). A

legislative classification is treated as "suspect" when it is

more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.

*Id.* at 217-18 n.14. Certain groups, although not "suspect," are deserving of a higher level of scrutiny than is accorded most legislative classifications. Differential treatment of these groups must be justified by a "substantial" state interest, because the groups have been historically "subjected to unique disabilities on the basis of stereotyped characteristics not truly corresponding to the attributes of [their] members." *J.W. v. City of Tacoma, Wash.*, 720 F.2d 1126, 1129 (9th Cir. 1983). The Supreme Court has extended such enhanced scrutiny thus far to classifications by sex, *Craig v. Boren*, 429 U.S. 190 (1976), by legitimacy of birth, *Lalli v. Lalli*, 439 U.S. 259 (1978), and by lawfulness of presence within the United States, *Plyler v. Doe*, 457 U.S. 202 (1983). *See also United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984).

This court concludes that persons with histories of mental illness are a quasi-suspect class deserving of intensified "intermediate" scrutiny; that is, any statute treating them differentially must be related to a "substantial" governmental interest. Even if persons with histories of mental illness are not a quasi-suspect

class deserving of heightened scrutiny, the provisions of 18 U.S.C. § 921 *et seq.* are simply not rational to the extent that they treat former mental patients differently *vis a vis* convicted criminals, in that they permanently deprive former mental patients of the opportunity to demonstrate changed circumstances which warrant the removal of the disqualification. The court determines that they violate not only plaintiff's right to equal protection, but his right to substantive due process as well.

A. *Former Mental Patients as a Quasi-Suspect Class*

The Supreme Court has expressly reserved judgment on the question of whether or not the mentally ill are deserving of heightened scrutiny. *Schweiker v. Wilson*, 450 U.S. 229, 231 n.13 (1981).<sup>4</sup> The Ninth Circuit has found former mental patients to be a "quasi-suspect" class entitled to "intermediate" scrutiny, however. *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983). In *City of Tacoma*, the Ninth Circuit recognized that "constitutional concerns are heightened by any classification scheme singling out former mental patients for differential treatment because of the possibility that the scheme will implement 'inaccurate and stereotypic fears' about former mental patients.[]" *Id.* at 1130-31.

The Third Circuit has not spoken directly on this issue. In its recent decision, *Cospito v. Heckler*, 742

<sup>4</sup> The Court has recently granted *certiorari* on the question of whether the mentally retarded are a "quasi-suspect" class entitled to enhanced scrutiny. *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 427 (1984); see also "Subject Matter Summary of Cases Recently Filed," 53 U.S.L.W. 3343-44 (Nov. 6, 1984).

F.2d 72 (3d Cir. 1984), the court applied a "rational basis" test in analyzing the claims of a group of mental patients who had lost certain federal benefits when the psychiatric hospital in which they were being treated lost its accreditation. The patients contended that "psychiatric hospitals will lose federal benefits more readily than a general hospital if deaccredited by JCAH [an accrediting agency], since such accreditation apparently does not affect in any way a general hospital's participation in Medicare or Medicaid . . . whereas a psychiatric hospital must either be JCAH accredited, or else certified under the 'distinct part' survey in order to qualify," and that this amounted to discrimination against the mentally ill. *Id.* at 83. In applying only minimal scrutiny, the Third Circuit carefully noted the Supreme Court's reservation of "the question of whether legislation expressly classifying mental patients as a discrete group must be examined under any enhanced standard of scrutiny," *Id.* n.19 (emphasis supplied), however. This court concludes from this note that the Third Circuit, like the Supreme Court, has reserved judgment on the question of what level of scrutiny to apply to legislation that explicitly singles out mental patients or those with a history of psychiatric hospitalizations for differential treatment. In the opinion of this court, the Third Circuit would not automatically apply a rational basis test if presented with these facts, particularly in light of the Ninth Circuit's holding in *Tacoma*, *supra* (striking down zoning regulation that treated group homes for former mental patients differently than other group homes).<sup>5</sup>

<sup>5</sup> Prior to *Schweiker*, in which the Supreme Court expressly reserved judgment on the standard of review for classifications of the mentally ill as a discrete group, the Third Circuit



This court is persuaded by the Ninth Circuit's holding that former mental patients do constitute a quasi-suspect class for fourteenth amendment purposes, but the court does not rest its decision on that ground.

### B. Application of the Rational Basis Test

The question of whether or not persons with a history of mental illness should be afforded enhanced scrutiny when singled out for differential treatment is not critical in this constitutional challenge to 18 U.S.C. § 921 *et seq.*, because, even under a rational basis test, this statute is defective under both equal protection and substantive due process theories.<sup>6</sup>

The court first notes its agreement with plaintiff's observation that the Supreme Court has not already decided this question in the *dicta* from *Dickerson v. New Banner Institute Inc.*, 103 S. Ct. 986 (1983), which is emphasized by defendant. In that case, holding that a state court's expunction of a criminal

---

applied a rational basis test in evaluating the constitutionality of a state statute setting differential time limits for benefits for hospitalization in mental as opposed to general hospitals. See *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979). The court relied on the Supreme Court's summary affirmance in *Legion v. Weinberger*, 414 U.S. 1058 (1973), *aff'g* *Legion v. Richardson*, 354 F.Supp. 456 (S.D.N.Y.) (three-judge court), in which the court below employed a rational basis test to uphold a limitation on the number of days of Medicaid and Medicare coverage for psychiatric as opposed to general hospitalizations for patients over 65. The explicit reservation of judgment in *Schweiker*, noted in *Cospito*, indicates that none of these cases supports the proposition that express classifications of individuals according to their history of psychiatric treatment are inevitably subject only to a rational basis analysis.

<sup>6</sup> The parties have applied only a rational basis analysis.

conviction would not automatically release a convict of his firearm disability under 18 U.S.C. § 921 *et seq.*, the Court stated that

[t]he imposition, by §§ 922(g)(4) and (h)(4), of continuing disability on a person who "has been" adjudicated a mental defective or committed to a mental institution is particularly instructive. A person adjudicated as a mental defective may later be adjudged competent, and a person committed to a mental institution may later be deemed cured and released. Yet Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies. Congress obviously felt that such a person, though fortunate, was too much of a risk to be allowed firearms privileges. . . . In the face of this fact, we cannot believe that Congress intended to have a person convicted of a firearms felony under state law become eligible for firearms automatic . . . because of a state expunction for whatever reason.

*Id.* at 993. In this passage, the Court referred to section 922's explicit treatment of persons with histories of psychiatric commitments simply in order to support its statutory interpretation of the import of an expunction under section 921 *et seq.* Possible constitutional infirmities in collateral clauses of the statute were not the focus of the Court. Significantly, as plaintiff has noted, the Court took special notice of the fact that "Congress carefully crafted a procedure for removing . . . disabilities [of convicts] in appropriate cases," *id.* at 995, and cited section 925(c), the very relief statute which the plaintiff has tried unsuccessfully to have applied to him. Arguably, the

Court felt free to dwell solely on questions of statutory interpretation *because of* this "escape clause" in the statutory sections with which it was concerned. It is the absence of this procedure for escape from disability for former mental patients, particularly in light of its availability for convicts, that creates the constitutional infirmity with which we are concerned here.<sup>7</sup>

The failure of the statute to provide former mental patients with the opportunity to contest their firearm disability is irrational in two ways that offend the due process and equal protection components of the fifth amendment. First, the statute offends the equal protection rights of former mental patients by treating them differently than others similarly situ-

<sup>7</sup> Defendant also cites a 1983 decision from the District of South Carolina as having considered this issue. *United States v. Jones*, 569 F. Supp. 395 (D.S.C. 1983). Again, this court must note its agreement with the plaintiff that the *Jones* court did not address the procedural infirmity this court finds in the statute. In *Jones*, the defendant, a former mental patient, was not seeking to have her disability removed so that she could purchase a firearm; she was instead under indictment for having purchased a firearm *without* any release from the statutory disability, a purchase she had accomplished by falsifying information about her prior hospitalizations. Presented with those facts, the *Jones* court found that it was not irrational "to prohibit persons within the category of 18 U.S.C. § 922(d)(4) from purchasing and/or receiving firearms." 569 F. Supp. at 399. This court does not disagree with that conclusion. But to conclude that it is rational to prohibit former mental patients in general from purchasing or receiving firearms is not to conclude that it is rational to deny individual former mental patients the opportunity to seek relief from this general disability with a showing that they are responsible enough to handle a firearm safely and legally, particularly when such an opportunity is afforded ex-convicts.

ated, *viz*, ex-convicts, without any logical justification for doing so. Second, the statute offends the due process rights of these individuals because it deprives them permanently and without any rational basis of the opportunity to demonstrate that they are no longer, or never were, incapable of handling firearms safely.

### 1) Equal Protection

Sub-sections (d)(4) and (h)(4) prohibit sales of firearms to, or purchases of firearms by, any person

- (1) who is under indictment for, or who has been convicted in any court of, a crime punishable for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug . . . or narcotic drug; or
- (4) who has been adjudicated as a mental defective or who has been committed to any mental institution.

Of these, only ex-convicts and former psychiatric patients are classed according to a *past* occurrence in their lives which might raise a presumption that they would be incapable of handling firearms safely in the future. All of the other classes of individuals are subject to present infirmities which are obviously direct indications that they might not be trustworthy with weapons. The statutory scheme allows the subject of a past conviction to show his reformation, in section 925, but does not allow the same opportunity to the subjects of a past commitment proceeding. Thus, out of all of the categories of individuals dis-



abled from purchasing firearms, only the former mental patients are permanently disabled on the basis of a past event that may or may not be an indicator of their present ability to handle firearms, with no opportunity to establish that, in fact, they are now capable of safe handling.<sup>9</sup>

There is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts. While, as noted below, this court objects to presumptively barring any individual based on a past event from the opportunity to prove that he or she should be released from disability, rational analysis suggests that, if anything, the bar would be more logically applied to convicts than to former mental patients, rather than vice versa. First, the bar has a punitive aspect which may be appropriate for one who has been duly convicted of a crime, but not for an innocent former mental patient. See *Plyler v. Doe*, *supra*, 457 U.S. at 220 ("the legal burdens should bear some relationship to individual responsibility or wrongdoing"). Second, individuals who are convicts have demonstrated that they are capable of criminal activity by actually committing the crime for which they were convicted, *cf.*, *Jones v. United States*, 103 S. Ct. 3043, 3049 (1983) ("[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness"); former mental patients have not, by virtue of that

<sup>9</sup> Section 925(c) does exclude convicts whose past convictions were for firearms-related offenses from its relief provisions, but such past convictions might rationally be considered good indicators of a potential for future firearms abuse, in contrast to a mere general finding of mental illness in the past.

status, indicated anything more than that they at one time were adjudged to have a propensity for disruptive activity.<sup>9</sup> Third, the committed patient who is released, as was Galoto, shortly after his commitment, may not have the same incentive to appeal the commitment as a convicted felon, so the propriety of the initial commitment may never be fully explored. The initial commitment proceeding is likely to be much more emergent than a criminal proceeding as well, if the proceeding is begun only upon a patient's seventy-two-hour notice of intention to leave, pursuant to New Jersey Statute Annotated 30:4-46 (hospital must discharge voluntarily admitted patient within seventy-two hours of request to leave absent commitment). Moreover, the commitment proceeding is likely to have fewer procedural safeguards (e.g., no right to a jury, N.J. Stat. Ann. 30:4-42; "clear and convincing" burden of proof rather than "beyond a reasonable doubt"). This last point is particularly disturbing in light of the studies cited by plaintiff, Mem. at 12, to the effect that commitment proceedings are replete with erroneous factual findings.

In sum, permanent disability is more appropriately accorded to convicts, if anyone, than to former mental patients. The only "rational" reason for failing to provide persons with psychiatric histories the opportunity to contest their disability must be based on some "archaic and stereotypic notions", *Tacoma*,

<sup>9</sup> An individual may be committed in New Jersey if "there is believed to exist in the patient a diagnosed mental illness of such degree and character that the person, if discharged, will probably imperil life, person, or property." N.J. Stat. Ann. 30:4-48. Thus, one without violent tendencies toward people may be committed on the belief that he will likely "imperil . . . property."

720 F.2d at 1129, citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982), that mental illness is always, in every instance, permanent and incurable. This ignores expanding knowledge about the causes of mental illnesses, their reversibility and treatment.

## 2. Substantive Due Process

The statute is unconstitutional not only because it treats former mental patients differently from and inferior to convicts, but also because it presumptively denies former mental patients the opportunity to establish that they no longer present the danger against which the statute was intended to guard. The statute in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous. An irrebuttable presumption violates the due process rights of the individual against whom it is applied unless it is "at least rationally related to a legitimate state objective." *Malmed v. Thornburgh*, 621 F.2d 565, 575, 578 (3d Cir.), cert. denied, 449 U.S. 955 (1980); see also *Stanley v. Illinois*, 405 U.S. 645 (1972) (unconstitutional to presume that all unwed fathers are unfit as parents); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir.), cert. denied, 450 U.S. 923 (1981) (unconstitutional to presume blind teacher not competent to teach English in public schools). This court does not question that the regulation of purchases and sales of firearms for the safety of the public is a legitimate, indeed substantial, state objective. But the application of an irrebuttable presumption against ownership of firearms by former mental patients is not a rational means of achieving that objective. Cf. *Hetherton v. Sears, Roebuck &*

*Co.*, 652 F.2d 1152 (3d Cir. 1981) ("[w]hile it may be true that [the state] could ban the sale of all deadly weapons, it does not follow that the state, having abrogated its power to effect a total ban," can regulate sale of weapons in an irrational manner).

The statute in question is irrational because, without any good faith extrinsic justification, such as administrative cost, it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed. At the outset, the court notes that the government has never questioned in this litigation the feasibility of affording relief proceedings to former mental patients. Indeed, given that the statutory scheme under examination here allows for relief from disability in cases involving convicts, the government cannot in good faith contend that its refusal to allow relief in the case of former mental patients is based on a concern over the expense of the relief procedure or its administrative feasibility. Neither does the relief procedure contemplated here implicate the concerns of repose and economy underlying the judicial principles of *res judicata* and collateral estoppel. The relief proceeding is not aimed at relitigating the issues litigated at the previous commitment hearing, but focuses on present circumstances, and on an ongoing civil disability independent of the original commitment.

Absent any rationale of economy or efficiency, the court can find no rationale for the statute but an archaic, stigmatizing, unreasoning fear of the mentally ill. As noted previously, "[l]egislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that



each person is to be judged individually." *Plyler*, 457 U.S. at 216 n.14. In plaintiff Galioto's case, the very physician who certified he should be committed, Dr. Alvarez, has now certified that Galioto is competent to handle a firearm. Indeed, the state courts that committed Galioto have now issued him a firearm identification card. Even if these events should not automatically relieve Galioto of his disability, *cf. Dickerson, supra*, they indicate that Congress' concerns in creating the disability for certain higher risk firearm purchasers no longer obtain in Galioto's case. The statute, however, permanently forecloses Galioto from challenging that disability.

Even *the very evidence*, namely, psychiatric opinion, which was responsible for the stigmatic label in the first instance, cannot erase this mark. The court appreciates the "fallibility of psychiatric diagnosis", *Addington v. Texas*, 441 U.S. 418, 429 (1979), and the fact that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts.'" *Estelle v. Smith*, 451 U.S. 454, 472 (1981) (citations omitted). But the shortcomings of psychiatry cannot excuse the failure to afford a former mental patient a hearing on his current mental competence for the purpose of overcoming a civil disability, where the government has been satisfied to rely on psychiatric evidence in imposing the disability in the first instance. That failure amounts to a denial of due process.

## CONCLUSION

The court does not today find it irrational to prohibit former mental patients generally from the purchase of firearms. The court finds rather that such a general prohibition is irrational and unconstitutional, if it does not include some provision for the granting of relief from disability to former mental patients in appropriate cases. As the defendant has noted, this court does not have the power to "create a review procedure for people in plaintiff's category," Defendant's Reply Mem. at 9, because "[t]hat would be a legislative function." The court can only declare those provisions of 18 U.S.C. § 921 *et seq.* which have been used to deprive plaintiff of his ability to purchase a firearm, without affording him any opportunity to contest that disability, to be void as violative of the fifth amendment of the United States Constitution.

The court does not mean to suggest by this opinion that all former sufferers of mental illness should be permitted to own firearms. But, rather, if Congress has determined that there are circumstances under which former criminals can own and possess weapons and a means is provided to establish such entitlement, former mental patients are entitled to no less. To hold otherwise is to implicitly declare that mental illness is incurable and that all those who have once suffered from it forever remain a danger to society. Such a conclusion is repugnant to our principles and is contradicted by the multitude of such persons who now live among us without incident. The anguish caused by mental illness is great enough without the imprimatur of a lifetime stigma embossed by congressional action.

Because the holding of the court in this matter will create a void in an area which clearly requires gov-

ernmental control and regulations, the court, on its own motion, will stay the effective date of its order for a period of 120 days, so as to afford to Congress an opportunity to correct the constitutional infirmities found to exist in the present legislation and to accord to former mental patients the rights, dignity and due process to which they are entitled.

/s/ H. Lee Sarokin  
H. LEE SAROKIN  
U.S.D.J.

Date: February 7, 1985

Original to Clerk, U.S. District Court

Copy to: Bianchi and Casale, Esqs.  
Peter R. Ginsberg, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-2045

ANTHONY J. GALIOTO, PLAINTIFF

v.

DEPARTMENT OF THE TREASURY, BUREAU OF  
ALCOHOL, TOBACCO, AND FIREARMS, DEFENDANT

ORDER

This matter having been opened to the court by W. Hunt Dumont, United States Attorney for the District of New Jersey (Peter R. Ginsberg, Assistant United States Attorney appearing), on behalf of the defendant, The Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, for an order dismissing the action, or, in the alternative, for summary judgment; and the court having considered the submissions of the parties; and for the reasons expressed in the Opinion of the court even dated herewith;

It is on this 7 day of February, 1985,

ORDERED that defendant's motion be and hereby is denied; and it is further

ORDERED that summary judgment be and hereby is granted in favor of the plaintiff; and it is further

ORDERED that the effective date of this order is stayed for a period of 120 days from the date of entry.

/s/ H. Lee Sarokin  
H. LEE SAROKIN  
U.S.D.J.

## APPENDIX C

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Civil Action No. 84-2045

ANTHONY J. GALIOTO, PLAINTIFF

v.

DEPARTMENT OF THE TREASURY, BUREAU OF  
ALCOHOL, TOBACCO, AND FIREARMS, DEFENDANT

[Filed Mar. 7, 1985]

Hon. H. Lee Sarokin

NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant, Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, hereby appeals to the Supreme Court of the United States from an Order dated February 7, 1985, granting plaintiff summary judgment in the instant action. This appeal is taken pursuant to 28 U.S.C. §§ 1252 and 2101.

Respectfully submitted,

W. HUNT DUMONT  
United States Attorney  
District of New Jersey

By: /s/ Peter R. Ginsberg  
PETER R. GINSBERG  
Assistant U.S. Attorney

## APPENDIX D

CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides in pertinent part:

No person shall \* \* \* be deprived of life, liberty, or property, without due process of law \* \* \*.

2. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, provides in pertinent part:

18 U.S.C. 922(d)

It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) has been adjudicated as a mental defective or has been committed to any mental institution.



This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

#### 18 U.S.C. 922(g)

It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

#### 18 U.S.C. 922(h)

It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

#### 18 U.S.C. 925(c)

A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector con-

ducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

3. Section 1202(a) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. 1202(a), provides in pertinent part:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

**MOTION**



84-1904

No. 84-2045

Supreme Court, U.S.

FILED

OCT 7 1985

JOSEPH F. SPANGL, JR.  
CLERK

In The

**Supreme Court of the United States**

October Term, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Appellant,*

-v-

ANTHONY J. GALIOTO,

*Appellee.*

*On Appeal from the United States District Court for the District  
of New Jersey*

**MOTION TO AFFIRM JUDGMENT**

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## **COUNTER STATEMENT OF QUESTIONS PRESENTED**

1. Whether Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 violates the equal protection and due process disabilities on persons previously committed to a mental institution without affording said persons the same administrative relief which is given to certain convicted felons, pursuant to 18 U.S.C. § 925(c).

2. If so, whether the District Court erred in remedying the constitutional violation by invalidating all of Title IV's restrictions on the acquisition of firearms by persons who have been committed to mental institutions, rather than by either expanding or nullifying only the administrative relief provision.

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No. 84-2045

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In The

**Supreme Court of the United States**

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October Term, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Appellant,*

vs.

ANTHONY J. GALIOTO,

*Appellee.*

*On Appeal from the United States District Court for the District  
of New Jersey*

---

**MOTION TO AFFIRM JUDGMENT**

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The appellee respectfully moves the Court under Rule 16 to summarily affirm the judgment and order of the United States District Court, dated February 7, 1955, on the grounds that the judgment of the court below is correct and that the appeal presents questions which are so unsubstantial that no further argument is needed.

### OPINION BELOW

The opinion of the United States District Court for the District of New Jersey is reported at 602 F.Supp. 682 and is reproduced in the Appendix to the Jurisdictional Statement and the Appendix to this Motion to Affirm, pp. 1a to 22a.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved contained in the Jurisdictional Statement is adequate and is adopted by appellee.

### STATEMENT OF THE CASE

The Statement of the Case contained in the Jurisdictional Statement is accurate and is adopted by appellee with the addition of the following facts which appellee believes to be relevant and material.

Appellee's admission to Fair Oaks, a psychiatric hospital, on May 11, 1971, as stated in the Jurisdictional Statement was indeed voluntary. Under New Jersey law, all patients who wish to leave such an institution prior to a formal medical discharge, must give the institution formal seventy-two (72) hour notice prior to being released (N.J.S.A. 30:4-45). This provision allows the physician and the patient's family an opportunity to diagnose and treat a patient who might be resistant to a prolonged hospitalization. Appellee signed such a notice and the hospital, with the consent of appellee's wife, instituted commitment proceedings. A commitment order was thereafter signed on May 31, 1971. Appellee was thereafter discharged as improved on June 5, 1971, by Dr. Alvarez, the physician who initially sought his commitment.

Ten (10) years later the same physician signed a certification attesting to the fact that appellee "was no longer suffering from any mental disability that would interfere with his handling of firearms" [App. *infra*, 23(a)].

### REASONS THE JUDGMENT OF THE DISTRICT COURT SHOULD BE SUMMARILY AFFIRMED

1. The District Court entered an order on February 7, 1985, granting summary judgment to the plaintiff invalidating certain portions of 18 U.S.C. § 921, *et seq.*, which deny former mental patients the right to challenge their federal firearms disability. In doing so, the court addressed the equal protection and due process infirmities inherent in the statutory scheme which infringed upon appellee's Fifth Amendment rights. For the following reasons, appellee respectfully submits that this Court should grant summary affirmance of the District Court's order without the necessity of reaching many of the complex legal issues presented.

A great deal of appellant's argument focuses on the court's discourse on the standard to be applied in assessing the alleged deprivation of constitutional rights. The court held, in fact, after a detailed and well reasoned analysis, that former mental patients' constituted a "quasi-suspect class deserving of intensified 'intermediate' scrutiny;" (App. *infra*, 9a). The court went on to find, however, that the statutes in question violated appellee's rights even under the minimal rational relationship test (App. *infra*, 12a).

Notwithstanding appellee's agreement with the court's analysis and findings that appellee is a member of a quasi-suspect

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1. The term "former mental patients" will be used hereinafter for simplicity to denote all those individuals to whom the sanctions of 18 U.S.C. §§ 922(d)(4); 922(g)(4); 922(h)(4) apply.



class, nor wishing to denigrate the import of this Court's final resolution of that question in view of the recent decision in *City of Cleburne, Texas v. Cleburne Living Center Inc., et al.*, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 3249, 53 Law Week 5022 (1985), it is most respectfully submitted that such a determination need not be decided where an alternate basis for a decision can be found. *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221 (1972). A decision in the case *sub judice* can be reached without breaking any new legal ground.

In particular, where a discriminatory treatment fails to survive a minimal rational relation test, there is no judicial need to determine if a more stringent standard should be applied. *Hooper v. Bernalillo County Assessor*, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 2862 (1985); *Zobel v. Williams*, 457 U.S. 55, 60-61, 102 S.Ct. 2309 (1982).

A rational basis analysis must of necessity begin with an identification of the objectives sought to be achieved by government. This Court, as well as many lower courts, have observed the intent of Title IV and Title VII of the Omnibus Crime Control Act to be "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Scarborough v. United States*, 431 U.S. 563, 572, 97 S.Ct. 1962 (1977); *Barret v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498 (1976). Congress could very well have adopted the broadest form of prophylaxis and simply banned outright the possession, sale and transportation of all firearms. It chose not to do so, however, and sought to strike a balance by granting the privilege of gun ownership to the vast majority of law abiding citizens, while restricting it for others. However, although the government can ban the sale of all deadly weapons, having abrogated its power to do so, it may not regulate the sale of weapons in an irrational manner. *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152 (3rd Cir. 1981). The

objective sought to be achieved was to bar possession of a firearm from persons whose prior behaviors have established their violent tendencies. 114 Cong. Rec. 13865 (1968) (remarks of Senator Long). Simply put, the protection of society justifies reasonable restrictions on the possession of firearms by those whose past actions provide a valid indication that such firearm possession presents a real threat to society.

2. The question presented on this appeal is *not* whether the initial disability contained in 18 U.S.C. § 922 prohibiting former mental patients from possessing firearms is rationally related to a legitimate governmental interest. This premise was not challenged by appellee, and the court took note of the fact that the initial classification is not unreasonable or irrational when viewed against Congress' salutary objectives (App. *infra*, 21a). Congress chose a statutory framework which, if applied non-discriminatorily, might well pass constitutional muster.

Instead, Congress saw fit to grant administrative relief from the firearm disabilities to some, while not granting such relief to others, thus creating a permanent ban on gun possession for some, including appellee. It is precisely this distinction and disparate treatment which the court found to be arbitrary and not rationally related to a legitimate governmental interest. Having given to one group procedural due process rights, Congress cannot arbitrarily deny those rights to others similarly situated, unless there is a rational factual basis for that disparate treatment.

Nowhere in the legislative history is there even the suggestion that providing similar administrative relief [as contained in § 925(c)] to former mental patients is based on factual differences between them and convicted felons.<sup>2</sup> Indeed, there is no evidence

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2. Appellant's argument that the failure to provide this remedy to former mental patients is buttressed by Congress' similar treatment of certain other

that such a distinction was the result of a conscious choice by the Legislature as opposed to a mere unintentional omission, contrary to appellant's assertions (Jurisdictional Statement, p. 11 n. 9).

The colloquy between Rep. Cellar and Rep. Sikes indicates nothing more than an acknowledgment of concern by Rep. Sikes for the rights of individuals like appellee. This concern was shared by Rep. MacGregor, who requested the bills draftsman to prepare an amendment to provide for a relief mechanism. For reasons undisclosed and unknown, the amendment was not proposed. Congress' failure to draft an amendment, in the absence of a specific vote against such a measure, can hardly be viewed as an intentional act with all of the connotations ascribed to it by appellant.

Congress has recently sought to remedy this oversight however. Senate Bill No. 49 was passed on July 9, 1985, by a vote of 79 to 15 (App. *infra*, 24a). This bill proposes substantial modifications to 18 U.S.C. § 921, *et seq.*, including a broadening of the scope of § 925(c) to provide a review procedure for *all* individuals suffering from federal firearms disabilities. While this bill has not yet been voted on in the House of Representatives, the clear mandate of the Senate cannot easily be overlooked. It

(Cont'd)

felons is clearly without merit. Section 925(c) does withhold administrative relief to those who have been convicted of a crime involving the use of a firearm, but as the Court observed "such past convictions might rationally be considered good indicators of a potential for future firearms abuse . . ." (App. *infra*, 16(a) n. 8). Additionally, permanent loss of the privilege to possess a firearm might well be considered rational solely for the punitive effect on those who have previously abused the privilege. Likewise, those who have renounced their American citizenship or have been dishonorably discharged from military service, have by their own acts provided a sufficient rational basis for the termination of certain privileges, if not outright punishment.

is respectfully submitted that, while a remedial bill is not in and of itself evidence of the constitutional deficiencies of the existing legislations, such action by one House in 1985, is certainly more indicative of current legal and medical wisdom than the original legislation in 1968.

The government's arguments fail to respond to the questions posed by the court in its opinion; what legitimate governmental interests are served by providing an administrative review procedure for convicted felons but refusing to provide such a procedure for former mental patients? No argument is advanced by the appellant to support this distinction.

As suggested by the court, a colorable argument could be advanced that administrative hearing procedures are cost prohibitive and therefore must be limited. Perhaps the reason appellant does not make this argument is the fact that such procedures are afforded to convicted felons. Nor does appellant argue that *res judicata* or collateral estoppel dictate severe limitations on further review procedures. Again, the appellant is currently engaging in such review procedures for convicted felons under the authority granted by 18 U.S.C. § 925(c). Moreover, as pointed out by the court, such procedures are limited in scope and in no way attempt to relitigate the issues raised during the criminal proceeding. Instead the focus of § 925(c) is *current status* with the object being an assessment of an individual's future behavior.

The closest the appellant comes to suggesting a legitimate basis for the distinction is to suggest that felons are "arguably more predictable . . ." "who may be better able than those with a history of mental illness voluntarily to conform their conduct to the law's requirements . . ." (Jurisdictional Statement, p. 13). This opinion, coupled with appellant's apparent acknowledgment and/or agreement with appellee's and the court's observations



regarding the inability of psychiatrists to predict future violent behavior (Jurisdictional Statement, p. 12) seems to indicate that appellant's justification for this disparate treatment is based precisely on the "archaic, stigmatizing, unreasoning fear of the mentally ill" (App. *infra*, 19a). To argue that convicted felons are "arguably more predictable" is ironic indeed in view of the studies which have shown that the greatest indicator of future criminal behavior is *past* criminal behavior. As stated by Professor John Monahan in a study sponsored by the National Institute of Mental Health, "If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act." Monahan, *The Clinical Prediction of Violent Behavior*, page 71 (1981). What these studies show is that the behavior of convicted felons can indeed be predicted and that they are more likely than others to commit additional criminal acts. In the face of this acknowledged greater degree of predictability, appellant nevertheless argues that a review procedure for convicted felons and none for former mental patients is rational.

Appellant likewise cites the very low reliability of predictions as to future violence (*Estelle v. Smith*, 451 U.S. 454, 472, 101 S.Ct. 1866 (1981) to support Congress' withholding review procedures for former mental patients (Jurisdictional Statement, pp. 11-12, n. 11). As succinctly pointed out by the court, the government cannot on one hand rely upon expert medical opinion to commit an individual, deprive him of his freedom and stigmatize him for life, while on the other hand refuse to provide that person with a review procedure to remove certain civil disabilities on the pretext that the proffered expert medical opinion would be too unreliable. The inherent unfairness and irrationality of such a position is even more telling in appellee's case where the very same physician who certified that he should be committed, subsequently certified that appellee is now competent to handle a firearm (App. *infra*, 23a).

In addition to this certification, appellee's behavior since his discharge has demonstrated his ability to handle firearms legally and safely. He has not been readmitted to any mental institutions, is not under continuing psychiatric care, nor has he broken any laws. Appellee has continued to own firearms since his discharge; yet, despite fourteen (14) years of exemplary behavior, he is not permitted to even attempt to persuade the Secretary of the Bureau of Alcohol, Tobacco and Firearms of his ability to safely own and use a firearm.

The appellant's argument that the permanent barring of former mental patients from possessing firearms is rational, would be sound if there was a *factual* basis for this distinction. For example, if clinical studies showed that former mental patients were more predisposed to engage in acts of physical violence than the general population, then extra caution in granting that group access to deadly weapons, or indeed any other potentially dangerous instruments, would be warranted. However, that extra caution need not take the form of a blanket, permanent prohibition. Congress recognized that not all convicted felons pose a danger to society. Many are convicted of nonviolent crimes, many others have been rehabilitated and some may have even been wrongly accused and convicted. Recognizing the imperfection of the criminal justice system and these other factors as well, Congress wisely used the criminal convictions *solely* as a screening device. The broad initial prohibition achieves Congress' objectives of reducing the risk to society, while the review procedure of § 925(c) tempers the "potential harshness" of the proscription. *Dickerson v. New Banner Institute Inc.*, 460 U.S. 103, 103 S.Ct. 986 (1983). Can it logically be argued that these same justifications for a review procedure do not exist for former mental patients? Conversely, can it seriously be argued that all mental patients are dangerous; that there are no incorrect commitments or that no mental patients are ever cured or improved? How then can the blanket permanent prohibition contained in § 922(g)(4) be



justified, unless a commitment to a mental institution in and of itself is a valid predictor of future violent behavior. The fallacy of this argument is that a civil commitment is based not on empirical facts but instead is founded on "expert opinion". What is conveniently overlooked is the disavowance of the commitment procedure by the medical community.

The consensus of opinion in the medical community is that "As a profession, psychiatry probably does not know more about how to predict dangerousness than any other professional group." Peszke, *Is Dangerousness an Issue for Physicians in Emergency Commitment?* American Journal of Psychiatry, 8:132, 825 (August, 1975). Dr. Alan A. Stone, Professor of Law and Psychiatry, Howard University has stated, "At the present time psychiatry lacks the capacity to identify dangerous patients with sufficient reliability to meet a court's evidentiary test of either beyond a reasonable doubt (about 90% certainty) or clear and convincing proof (about 75% certainty)." Stone, *Comment*, American Journal of Psychiatry, 132:8, 829 (August, 1975).

Doctors Beigel, Berren and Harding recently conducted a survey of forty (40) psychiatrists to determine their ability to rate mental patients, both with and without a civil commitment statute. The hypothesis of the study was that the use of a specific statutory definition of dangerousness would increase the rate of agreement in diagnosis among the psychiatrists. In fact, their findings were just the opposite.

"If the commitment statute interferes with consistency of ratings, the question becomes, 'What is the role of the law?' Essentially, one of its primary roles appears to be to eliminate the number of false positives (that is, those individuals who without the statute would be rated as dangerous, but who in fact are of no danger) that

occur in the psychiatric-legal arena." Beigel, Berren and Harding, *The Paradoxical Impact of a Commitment Statute on Prediction of Dangerousness*, American Journal Psychiatry, 141:3, 373 (March, 1984).

Faced with the ambiguity of a commitment statute and mindful of the balances to be weighed in a commitment process, it is no wonder that psychiatrists tend to "over commit". Justice Berns of the Appellate Division, New York Supreme Court has observed,

"Issues of personal or culture bias aside, it has been suggested that the nature of psychiatric training and methodology may predispose psychiatrists to over prediction of violence. A physician is trained to detect illness, always mindful of the fact that it is safer to assume that disease exists than it is to err by disregarding that possibility." Berns and Levien, *Dangerousness: Legal Determinations and Clinical Speculations*, Psychiatric Quarterly 52(2) 108, 114-115 (Summer, 1980).

This observation has been documented by statistical analysis. In *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 76 (1966), the Supreme Court mandated the release of nearly 1,000 prisoner patients who had been confined in facilities for the criminally insane instead of civil hospitals, because of their alleged dangerousness. A four (4) year follow up study documented the error of the initial diagnosis. Only 26 of the 967 patients exhibited signs of violence sufficient to require their return to hospitals for the criminally insane. Cocozza and Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers Law Rev. 1084.

Justice Berns concludes,

"Given the statistical probability of overprediction, it would seem imperative that courts not act in total reliance upon psychiatric determinations of dangerousness when adjudicating an individual's right to freedom." Berns and Levien, *supra* at 117.

Dr. Henry J. Steadman, who has written extensively in this field addressed the problem of over-prediction of dangerousness in his article, *The Right Not To Be a False Positive: Problems in the Application of the Dangerous Standard*, *Psychiatric Quarterly* 52(2) (Summer, 1980). In reviewing the existing studies and medical literature, Dr. Steadman concluded that in a group of 1,000 persons, 5 might be expected to engage in an assaultive act within the next 12 months. However, in order to pick even 3 or 4 of the 5 who would be assaultive, approximately 25 or 30 would be incorrectly identified. This results in a false positive rate of 8 or 10 to 1. *Id.* at 85-86. In reviewing the various types of clinical studies to assess psychiatrists' ability to predict dangerousness, Dr. Steadman concludes,

"In examining the issues of predicting dangerous behavior and the application of the dangerousness standard, it may be productive to turn the usual questions around. That is, rather than asking what evidence is there, that psychiatrists, or other clinicians, cannot accurately predict dangerous behavior, what evidence is there that they *can*? When the question is phrased in this manner, the answer is unequivocal. *There is none*. Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance." *Id.* at 96.

The problem of the excessive "false positive" rate is endemic to the basic tenets of the practice of medicine.

"According to Shah, the basic decision rule in law is 'when in doubt-acquit'; the error that is most important to avoid is an erroneous conviction (a false positive). The decision rule in medicine is quite the reverse; 'when in doubt, continue to suspect illness' and thus the doctor is encouraged to avoid false negatives. The assumption underlying the medical decision rule is based upon the conviction that there is no harm done in retaining an individual in the hospital; however, as we have seen, when the hospital is a psychiatric institution and entrance to it is not voluntary, this assumption may be erroneous." Laves, *The Prediction of Dangerousness as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 *Journal of Psychiatry and Law*, 291, 317-318 (1975).

In the absence of clinical studies or learned psychiatric opinions supporting the distinction carved out in the statute, the trial court found the distinction based on "inaccurate and stereotypic fears" about former mental patients (App. *infra*, 10a). This stereotype is widely acknowledged in both the legal and medical communities. As stated by the President's Commission on Mental Health:

"The sporadic violence of so-called 'mentally ill killers' as depicted in stories and dramas is more of a device of fiction than a fact of life. Patients with serious psychological disorders are more likely to be withdrawn, apathetic and fearful. We do not deny that some mentally ill people are violent, but

the image of the mentally ill person as essentially a violent person is erroneous." *Id.* at 56 (1978).

The trial court's decision was sound and was a proper exercise of the court's authority. As noted by appellant, once the court determined that the statute violated appellee's equal protection and due process rights, it had *two* remedial choices. It could either invalidate the entire statute which it elected to do, or instead have expanded the coverage of § 925(c) to include members of appellee's class. *Heckler v. Matthews*, 104 S.Ct. 1387, 1394 (1984). The remedy chosen by the court was to nullify those provisions of § 921, *et seq.*, which deprive appellee of the right to purchase a firearm, since those provisions create a permanent, irreversible bar to firearms ownership without the review procedure afforded convicted felons in § 925(c). Appellant's suggestion that the court should have either nullified or extended § 925(c) misses the point for two reasons. Firstly, it is not § 925(c) but § 922(d)(4); (g)(4) and (h)(4) which bar appellee from owning a firearm. Secondly, appellant argued before the trial court, quite effectively, that the court was powerless to create a review procedure for appellee and others in similar situations on the grounds that to do so would usurp Congress' legislative function. Although appellant now recognizes the error of its argument in light of the unequivocal holdings of *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792 (1970) and *Califano v. Wescott*, 443 U.S. 76, 99 S.Ct. 2655 (1979), nevertheless the court's choice was proper. As Justice Powell cautioned in his concurring opinion in *Wescott*, "In choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole . . . It should not use its remedial powers to circumvent the intent of the legislature." *Id.* at 94, 99 S.Ct. at 2666. The extension of § 925(c) to accommodate former mental patients, although beneficial to appellee, might well have only partially cured the constitutional infirmity for the statute still permanently prohibits others from firearm possession.

Rather than correct the statute in a piecemeal fashion by extension, Congress might well want to provide for a hearing procedure for *all* individuals suffering from a firearm disability. In fact, Senate Bill 49 has done precisely this by providing a review procedure to all persons barred by the statute from possessing firearms. The court's choice of remedy properly returned the responsibility for redrafting the statute to Congress, rather than attempting to engage in piecemeal legislation.

### CONCLUSION

It is respectfully submitted that for all of the foregoing reasons, summary affirmance should be granted.

Respectfully submitted,

MICHAEL A. CASALE  
 BIANCHI AND CASALE  
*Attorneys for Appellee*



1a  
APPENDIX A

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No. 84-2045

ANTHONY J. GALIOTO, PLAINTIFF

*v.*

THE DEPARTMENT OF THE TREASURY, BUREAU OF  
ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

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OPINION

SAROKIN, District Judge

INTRODUCTION

In a society which persists and insists in permitting its citizens to own and possess weapons, it becomes necessary to determine who may and who may not acquire them. At issue in this matter is a statute reminiscent of the Dark Ages, which permits a person convicted of a crime to purchase a gun under certain circumstances, but denies that same right to a person once committed for mental illness no matter what the circumstances. Apparently one who has been convicted of a crime can be relieved of the stigma arising from such a conviction, but a commitment for mental illness renders one permanently disqualified. The statute thus implies that mental illness is incurable, and that those persons with a history of

mental illness who have never committed a crime are deemed more likely to commit one in the future than those persons who have actually done so in the past. If persons with criminal records are permitted to purchase and possess weapons after meeting certain standards, certainly persons who have conquered past mental illness are entitled to the same consideration and rights. To impose a perpetual and permanent ban against anyone who has ever been committed for mental illness, no matter how ancient the commitment or how complete the cure, is to elevate superstition over science and unsupported fear over equal protection and due process. Accordingly, the court finds this provision of the subject statute to be unconstitutional.

The instant motion has been brought by defendant to dismiss plaintiff's complaint or, in the alternative, for summary judgment. A party moving for summary judgment cannot prevail unless there exists no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 95 (3d Cir. 1982). When the court has determined upon undisputed facts that the non-moving party, rather than the movant, is entitled to judgment as a matter of law, "it is well within the district court's discretion to enter summary judgment for the non-moving party." *Selected Risks Ins. Co. v. Bruno*, 555 F. Supp. 590 (M.D. Pa. 1982), *rev'd on other grounds*, 718 F.2d 67 (3d Cir. 1983); *see also* 6 *Moore's Federal Practice*, ¶ 56.12 (2d ed. 1984). Such is the case here. The defendant Bureau of Alcohol, Tobacco, and Firearms (Bureau), asks the court to grant summary judgment in its favor on the grounds that the plaintiff has no entitlement to relief under

18 U.S.C. § 925(c), pursuant to which the plaintiff sues. Instead, the court finds that section 925(c) and the related statutory provisions in 18 U.S.C. § 921 *et seq.* are invalid as infringements upon the plaintiff's right to due process as guaranteed by the fifth amendment to the United States Constitution.

### FACTS

Plaintiff Anthony Galioto is a 57-year-old long-standing resident of West Orange, New Jersey. Galioto served in the Armed Forces from 1951 to 1953, was honorably discharged, and has since held a position as an engineer with the New York and New Jersey Port Authority. Plaintiff's Memorandum of Law, Exh. D. In 1971, having had no prior history of mental illness, Galioto suffered an acute mental breakdown and voluntarily entered Fair Oaks Hospital in Summit, New Jersey. Plaintiff's Mem., Exh. B. He was diagnosed as having suffered an acute schizophrenic episode with paranoid features. Galioto remained hospitalized for twenty-three days from May 11 to June 4, 1971.

During Galioto's hospital stay, when Galioto expressed his intention to leave, his physician, Dr. R.G. Alvarez, sought to have him committed. On May 31, 1971, the Essex County Juvenile and Domestic Relations Court entered a final order of commitment. Galioto was released five days later, after Dr. Alvarez determined that Galioto's condition had improved. There is no evidence that Galioto was ever again hospitalized for mental illness.

Ten years after this hospitalization, Galioto applied to the Superior Court of New Jersey, Essex County, Law Division, for an order granting him a firearms purchase identification card pursuant to

New Jersey Statute Annotated 2C:58-3(b), which order was granted on April 27, 1981. Thereafter, in October, 1982, plaintiff attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. Ray's Sport Shop refused to sell any firearm to plaintiff when he responded "yes" to a question on a standard Bureau questionnaire asking: "Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?" 18 U.S.C. § 922(d)(4) makes it unlawful for a licensed dealer in firearms "to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or had been committed to any mental institution."<sup>1</sup>

A few days after said refusal, Galioto applied to the defendant Bureau in Washington, D.C., for a release from firearms disability pursuant to 18 U.S.C. § 925(c). Papers submitted by plaintiff included a certification from Dr. Alvarez, the physician who had sought Galioto's commitment in 1971, to the effect that Galioto was no longer suffering from any mental disability that would interfere with his handling of firearms. Section 925(c), under which Galioto sought relief from his firearm disability, provides in pertinent part:

A person who has been convicted of a crime punishable for a term exceeding one year (other than a crime involving the use of a firearm or

<sup>1</sup> Another subsection of section 922, section 922(h)(4), makes it unlawful for "any person . . . who has been adjudicated as a mental defective or who has been committed to any mental institution . . . to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce."

other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition . . . of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding such conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.<sup>2</sup>

There is no equivalent provision establishing a mechanism by which a former mental patient can seek relief from the firearms disabilities imposed upon him by federal law. By letter dated April 13, 1984, the Director of the Bureau of Alcohol, Tobacco, and Firearms, Stephen E. Higgins, denied plaintiff's application for relief from firearms disability, asserting that Galioto was "subject to Federal firearms disability because of his commitment." Exhibit A to Complaint.

The Bureau argues in support of its motion that it was powerless to release Galioto from disability under section 925(c), because that section allows for a release from disability *only* for those disabled due to criminal convictions, not those disabled as a result of past commitment to a mental institution. Sections

<sup>2</sup> Firearm disabilities equivalent to those imposed on persons who have been adjudicated mentally defective or committed to a mental institution are imposed on persons who have "been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year." §§ 922(d)(1) and 922(h)(1).



922(d)(4) and (h)(4), according to the Bureau, create a permanent and irreversible disability for anyone ever committed to a mental institution, without regard to the length of the commitment, the length of the interval between the commitment and the proposed firearms purchase, the source or severity of the original illness, the improvement of the person subject to the disability, the evolution of medical knowledge about the illness for which the former patient was committed, or the propriety and correctness of the commitment in the first instance.<sup>3</sup>

## DISCUSSION

### I. *Issues of Fact*

Plaintiff has contended, in defense of this motion, that there remains a disputed issue of fact which ought to preclude summary judgment. He argues that the Director's decision to deny plaintiff relief rested on two factual determinations: "(1) that plaintiff had been committed to a mental institution and (2) that plaintiff was discharged on a determination other than a finding that he was competent." Plaintiff's Mem. at 3; also Exh. A to Complaint. Plaintiff argues that the Director would or should have released plaintiff from his disability had he found that plaintiff's commitment was "factually erroneous," that is, that plaintiff "was not mentally ill at the time of his commitment or alternatively that he was subsequently discharged based on a finding of mental competence." Plaintiff's Mem. at 5. Plaintiff does

<sup>3</sup> The court has serious doubt whether an applicant could collaterally attack such a commitment in this type of a proceeding, even if appropriate means were provided to seek relief.

not argue that his commitment was, in fact, "erroneous," but notes that it was of short duration. The Bureau maintains, on the other hand, that the fact of plaintiff's commitment alone is enough to disable him permanently, whether or not that commitment was erroneous. It notes in any event that plaintiff was prescribed medication upon his discharge, indicating that he was not wholly "competent" at that time.

The court finds no issue of fact raised here that should preclude summary judgment in favor of the plaintiff. The Bureau has taken the position that it is powerless under sections 922 and 925 to release plaintiff from his disability even if it were shown as a matter of fact that plaintiff's commitment was indeed erroneous, or for any other reason. This interpretation is entitled to some, albeit limited, deference as an indication of the intended "meaning" of the statute. *Columbia Gas Transmission Corp. v. F.P.C.*, 530 F.2d 1056, 1059 (D.C. Cir. 1976) (deference given to agency's determination of meaning of statute in light of agency expertise); *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984) ("legal interpretations by tribunals having expertise are helpful [to reviewing court]"). Moreover, the Bureau presents a plausible argument that the statute is to be read literally, relying on *Dickerson v. New Banner Institute*, 103 S. Ct. 986 (1983) (state expunction of conviction did not relieve plaintiff of firearms disability under literal terms of 18 U.S.C. §§ 921 *et seq.*, imposing disability based on fact of conviction), and that section 925 simply does not give it authority to relieve plaintiff of his disability, whatever the circumstances surrounding his commitment or thereafter. In gen-

eral, a court should avoid reaching a constitutional question when an issue can be resolved as a matter of statutory interpretation. *See, e.g., United States v. Security Industrial Bank*, — U.S. —, 103 S. Ct. 407, 411 (1982); *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Here, however, where the statutory interpretation of the agency is well-founded and where the plaintiff has not submitted evidence to demonstrate that he comes within the exception to the statute which he urges, it is not necessary to prolong these proceedings in anticipation of further proofs in order to avoid confronting the patent constitutional defect in section 921, *et seq.* The purpose of summary judgment is "to eliminate a trial in cases in which it is unnecessary and would only cause delay and expense[']" *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.), *cert. denied*, 429 U.S. 1038 (1977).

## 2. Issues of Law—The Statute's Infirmary Under the Fifth Amendment

It is well settled that the due process clause of the fifth amendment includes an equal protection component. *See, e.g., Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2180 (1984). Federal government action violates the equal protection component of the due process clause when it treats similarly situated groups differently without a substantial or compelling government interest, if the groups are suspect or "quasi-suspect" classes entitled to enhanced scrutiny, or a fundamental right is involved, or if it acts without a rational basis, where the groups are not suspect classes and no fundamental right is implicated. *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). A

legislative classification is treated as "suspect" when it is

more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.

*Id.* at 217-18 n.14. Certain groups, although not "suspect," are deserving of a higher level of scrutiny than is accorded most legislative classifications. Differential treatment of these groups must be justified by a "substantial" state interest, because the groups have been historically "subjected to unique disabilities on the basis of stereotyped characteristics not truly corresponding to the attributes of [their] members." *J.W. v. City of Tacoma, Wash.*, 720 F.2d 1126, 1129 (9th Cir. 1983). The Supreme Court has extended such enhanced scrutiny thus far to classifications by sex, *Craig v. Boren*, 429 U.S. 190 (1976), by legitimacy of birth, *Lalli v. Lalli*, 439 U.S. 259 (1978), and by lawfulness of presence within the United States, *Plyler v. Doe*, 457 U.S. 202 (1983). *See also United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984).

This court concludes that persons with histories of mental illness are a quasi-suspect class deserving of intensified "intermediate" scrutiny; that is, any statute treating them differentially must be related to a "substantial" governmental interest. Even if persons with histories of mental illness are not a quasi-suspect



class deserving of heightened scrutiny, the provisions of 18 U.S.C. § 921 *et seq.* are simply not rational to the extent that they treat former mental patients differently *vis a vis* convicted criminals, in that they permanently deprive former mental patients of the opportunity to demonstrate changed circumstances which warrant the removal of the disqualification. The court determines that they violate not only plaintiff's right to equal protection, but his right to substantive due process as well.

#### A. *Former Mental Patients as a Quasi-Suspect Class*

The Supreme Court has expressly reserved judgment on the question of whether or not the mentally ill are deserving of heightened scrutiny. *Schweiker v. Wilson*, 450 U.S. 229, 231 n.13 (1981).<sup>4</sup> The Ninth Circuit has found former mental patients to be a "quasi-suspect" class entitled to "intermediate" scrutiny, however. *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983). In *City of Tacoma*, the Ninth Circuit recognized that "constitutional concerns are heightened by any classification scheme singling out former mental patients for differential treatment because of the possibility that the scheme will implement 'inaccurate and stereotypic fears' about former mental patients.['']" *Id.* at 1130-31.

The Third Circuit has not spoken directly on this issue. In its recent decision, *Cospito v. Heckler*, 742

<sup>4</sup> The Court has recently granted *certiorari* on the question of whether the mentally retarded are a "quasi-suspect" class entitled to enhanced scrutiny. *Cleburne Living Center v. City of Cleburne*, 105 S. Ct. 427 (1984); see also "Subject Matter Summary of Cases Recently Filed," 53 U.S.L.W. 3343-44 (Nov. 6, 1984).

F.2d 72 (3d Cir. 1984), the court applied a "rational basis" test in analyzing the claims of a group of mental patients who had lost certain federal benefits when the psychiatric hospital in which they were being treated lost its accreditation. The patients contended that "psychiatric hospitals will lose federal benefits more readily than a general hospital if deaccredited by JCAH [an accrediting agency], since such accreditation apparently does not affect in any way a *general* hospital's participation in Medicare or Medicaid . . . whereas a psychiatric hospital must either be JCAH accredited, or else certified under the 'distinct part' survey in order to qualify," and that this amounted to discrimination against the mentally ill. *Id.* at 83. In applying only minimal scrutiny, the Third Circuit carefully noted the Supreme Court's reservation of "the question of whether legislation *expressly* classifying mental patients as a discrete group must be examined under any enhanced standard of scrutiny," *Id.* n.19 (emphasis supplied), however. This court concludes from this note that the Third Circuit, like the Supreme Court, has reserved judgment on the question of what level of scrutiny to apply to legislation that explicitly singles out mental patients or those with a history of psychiatric hospitalizations for differential treatment. In the opinion of this court, the Third Circuit would not automatically apply a rational basis test if presented with these facts, particularly in light of the Ninth Circuit's holding in *Tacoma*, *supra* (striking down zoning regulation that treated group homes for former mental patients differently than other group homes).<sup>5</sup>

<sup>5</sup> Prior to *Schweiker*, in which the Supreme Court expressly reserved judgment on the standard of review for classifications of the mentally ill as a discrete group, the Third Circuit



This court is persuaded by the Ninth Circuit's holding that former mental patients do constitute a quasi-suspect class for fourteenth amendment purposes, but the court does not rest its decision on that ground.

### B. *Application of the Rational Basis Test*

The question of whether or not persons with a history of mental illness should be afforded enhanced scrutiny when singled out for differential treatment is not critical in this constitutional challenge to 18 U.S.C. § 921 *et seq.*, because, even under a rational basis test, this statute is defective under both equal protection and substantive due process theories.<sup>6</sup>

The court first notes its agreement with plaintiff's observation that the Supreme Court has not already decided this question in the *dicta* from *Dickerson v. New Banner Institute Inc.*, 103 S. Ct. 986 (1983), which is emphasized by defendant. In that case, holding that a state court's expunction of a criminal

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applied a rational basis test in evaluating the constitutionality of a state statute setting differential time limits for benefits for hospitalization in mental as opposed to general hospitals. See *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979). The court relied on the Supreme Court's summary affirmance in *Legion v. Weinberger*, 414 U.S. 1058 (1973), *aff'g Legion v. Richardson*, 354 F.Supp. 456 (S.D.N.Y.) (three-judge court), in which the court below employed a rational basis test to uphold a limitation on the number of days of Medicaid and Medicare coverage for psychiatric as opposed to general hospitalizations for patients over 65. The explicit reservation of judgment in *Schweiker*, noted in *Cospito*, indicates that none of these cases supports the proposition that express classifications of individuals according to their history of psychiatric treatment are inevitably subject only to a rational basis analysis.

<sup>6</sup> The parties have applied only a rational basis analysis.

conviction would not automatically release a convict of his firearm disability under 18 U.S.C. § 921 *et seq.*, the Court stated that

[t]he imposition, by §§ 922(g)(4) and (h)(4), of continuing disability on a person who "has been" adjudicated a mental defective or committed to a mental institution is particularly instructive. A person adjudicated as a mental defective may later be adjudged competent, and a person committed to a mental institution may later be deemed cured and released. Yet Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies. Congress obviously felt that such a person, though fortunate, was too much of a risk to be allowed firearms privileges. . . . In the face of this fact, we cannot believe that Congress intended to have a person convicted of a firearms felony under state law become eligible for firearms automatically because of a state expunction for whatever reason.

*Id.* at 993. In this passage, the Court referred to section 922's explicit treatment of persons with histories of psychiatric commitments simply in order to support its statutory interpretation of the import of an expunction under section 921 *et seq.* Possible constitutional infirmities in collateral clauses of the statute were not the focus of the Court. Significantly, as plaintiff has noted, the Court took special notice of the fact that "Congress carefully crafted a procedure for removing . . . disabilities [of convicts] in appropriate cases," *id.* at 995, and cited section 925(c), the very relief statute which the plaintiff has tried unsuccessfully to have applied to him. Arguably, the

Court felt free to dwell solely on questions of statutory interpretation *because of* this "escape clause" in the statutory sections with which it was concerned. It is the absence of this procedure for escape from disability for former mental patients, particularly in light of its availability for convicts, that creates the constitutional infirmity with which we are concerned here.<sup>7</sup>

The failure of the statute to provide former mental patients with the opportunity to contest their firearm disability is irrational in two ways that offend the due process and equal protection components of the fifth amendment. First, the statute offends the equal protection rights of former mental patients by treating them differently than others similarly situ-

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<sup>7</sup> Defendant also cites a 1983 decision from the District of South Carolina as having considered this issue. *United States v. Jones*, 569 F. Supp. 395 (D.S.C. 1983). Again, this court must note its agreement with the plaintiff that the *Jones* court did not address the procedural infirmity this court finds in the statute. In *Jones*, the defendant, a former mental patient, was not seeking to have her disability removed so that she could purchase a firearm; she was instead under indictment for having purchased a firearm *without* any release from the statutory disability, a purchase she had accomplished by falsifying information about her prior hospitalizations. Presented with those facts, the *Jones* court found that it was not irrational "to prohibit persons within the category of 18 U.S.C. § 922(d)(4) from purchasing and/or receiving firearms." 569 F. Supp. at 399. This court does not disagree with that conclusion. But to conclude that it is rational to prohibit former mental patients in general from purchasing or receiving firearms is not to conclude that it is rational to deny individual former mental patients the opportunity to seek relief from this general disability with a showing that they are responsible enough to handle a firearm safely and legally, particularly when such an opportunity is afforded ex-convicts.

ated, *viz*, ex-convicts, without any logical justification for doing so. Second, the statute offends the due process rights of these individuals because it deprives them permanently and without any rational basis of the opportunity to demonstrate that they are no longer, or never were, incapable of handling firearms safely.

### 1) Equal Protection

Sub-sections (d)(4) and (h)(4) prohibit sales of firearms to, or purchases of firearms by, any person

- (1) who is under indictment for, or who has been convicted in any court of, a crime punishable for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug . . . or narcotic drug; or
- (4) who has been adjudicated as a mental defective or who has been committed to any mental institution.

Of these, only ex-convicts and former psychiatric patients are classed according to a *past* occurrence in their lives which might raise a presumption that they would be incapable of handling firearms safely in the future. All of the other classes of individuals are subject to present infirmities which are obviously direct indications that they might not be trustworthy with weapons. The statutory scheme allows the subject of a past conviction to show his reformation, in section 925, but does not allow the same opportunity to the subjects of a past commitment proceeding. Thus, out of all of the categories of individuals dis-



abled from purchasing firearms, only the former mental patients are permanently disabled on the basis of a past event that may or may not be an indicator of their present ability to handle firearms, with no opportunity to establish that, in fact, they are now capable of safe handling.<sup>8</sup>

There is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts. While, as noted below, this court objects to presumptively barring any individual based on a past event from the opportunity to prove that he or she should be released from disability, rational analysis suggests that, if anything, the bar would be more logically applied to convicts than to former mental patients, rather than vice versa. First, the bar has a punitive aspect which may be appropriate for one who has been duly convicted of a crime, but not for an innocent former mental patient. See *Plyler v. Doe*, *supra*, 457 U.S. at 220 ("the legal burdens should bear some relationship to individual responsibility or wrongdoing"). Second, individuals who are convicts have demonstrated that they are capable of criminal activity by actually committing the crime for which they were convicted, *cf.*, *Jones v. United States*, 103 S. Ct. 3043, 3049 (1983) ("[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness"); former mental patients have not, by virtue of that

<sup>8</sup> Section 925(c) does exclude convicts whose past convictions were for firearms-related offenses from its relief provisions, but such past convictions might rationally be considered good indicators of a potential for future firearms abuse, in contrast to a mere general finding of mental illness in the past.

status, indicated anything more than that they at one time were adjudged to have a propensity for disruptive activity.<sup>9</sup> Third, the committed patient who is released, as was Galioto, shortly after his commitment, may not have the same incentive to appeal the commitment as a convicted felon, so the propriety of the initial commitment may never be fully explored. The initial commitment proceeding is likely to be much more emergent than a criminal proceeding as well, if the proceeding is begun only upon a patient's seventy-two-hour notice of intention to leave, pursuant to New Jersey Statute Annotated 30:4-46 (hospital must discharge voluntarily admitted patient within seventy-two hours of request to leave absent commitment). Moreover, the commitment proceeding is likely to have fewer procedural safeguards (e.g., no right to a jury, N.J. Stat. Ann. 30:4-42; "clear and convincing" burden of proof rather than "beyond a reasonable doubt"). This last point is particularly disturbing in light of the studies cited by plaintiff, Mem. at 12, to the effect that commitment proceedings are replete with erroneous factual findings.

In sum, permanent disability is more appropriately accorded to convicts, if anyone, than to former mental patients. The only "rational" reason for failing to provide persons with psychiatric histories the opportunity to contest their disability must be based on some "archaic and stereotypic notions", *Tacoma*,

<sup>9</sup> An individual may be committed in New Jersey if "there is believed to exist in the patient a diagnosed mental illness of such degree and character that the person, if discharged, will probably imperil life, person, or property." N.J. Stat. Ann. 30:4-48. Thus, one without violent tendencies toward people may be committed on the belief that he will likely "imperil . . . property."



720 F.2d at 1129, citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982), that mental illness is always, in every instance, permanent and incurable. This ignores expanding knowledge about the causes of mental illnesses, their reversibility and treatment.

## 2. Substantive Due Process

The statute is unconstitutional not only because it treats former mental patients differently from and inferior to convicts, but also because it presumptively denies former mental patients the opportunity to establish that they no longer present the danger against which the statute was intended to guard. The statute in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous. An irrebuttable presumption violates the due process rights of the individual against whom it is applied unless it is "at least rationally related to a legitimate state objective." *Malmed v. Thornburgh*, 621 F.2d 565, 575, 578 (3d Cir.), cert. denied, 449 U.S. 955 (1980); see also *Stanley v. Illinois*, 405 U.S. 645 (1972) (unconstitutional to presume that all unwed fathers are unfit as parents); *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir.), cert. denied, 450 U.S. 923 (1981) (unconstitutional to presume blind teacher not competent to teach English in public schools). This court does not question that the regulation of purchases and sales of firearms for the safety of the public is a legitimate, indeed substantial, state objective. But the application of an irrebuttable presumption against ownership of firearms by former mental patients is not a rational means of achieving that objective. Cf. *Hetherton v. Sears, Roebuck &*

*Co.*, 652 F.2d 1152 (3d Cir. 1981) ("[w]hile it may be true that [the state] could ban the sale of all deadly weapons, it does not follow that the state, having abrogated its power to effect a total ban," can regulate sale of weapons in an irrational manner).

The statute in question is irrational because, without any good faith extrinsic justification, such as administrative cost, it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed. At the outset, the court notes that the government has never questioned in this litigation the feasibility of affording relief proceedings to former mental patients. Indeed, given that the statutory scheme under examination here allows for relief from disability in cases involving convicts, the government cannot in good faith contend that its refusal to allow relief in the case of former mental patients is based on a concern over the expense of the relief procedure or its administrative feasibility. Neither does the relief procedure contemplated here implicate the concerns of repose and economy underlying the judicial principles of *res judicata* and collateral estoppel. The relief proceeding is not aimed at relitigating the issues litigated at the previous commitment hearing, but focuses on present circumstances, and on an ongoing civil disability independent of the original commitment.

Absent any rationale of economy or efficiency, the court can find no rationale for the statute but an archaic, stigmatizing, unreasoning fear of the mentally ill. As noted previously, "[l]egislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that

each person is to be judged individually." *Plyler*, 457 U.S. at 216 n.14. In plaintiff Galioto's case, the very physician who certified he should be committed, Dr. Alvarez, has now certified that Galioto is competent to handle a firearm. Indeed, the state courts that committed Galioto have now issued him a firearm identification card. Even if these events should not automatically relieve Galioto of his disability, *cf. Dickerson, supra*, they indicate that Congress' concerns in creating the disability for certain higher risk firearm purchasers no longer obtain in Galioto's case. The statute, however, permanently forecloses Galioto from challenging that disability.

Even *the very evidence*, namely, psychiatric opinion, which was responsible for the stigmatic label in the first instance, cannot erase this mark. The court appreciates the "fallibility of psychiatric diagnosis", *Addington v. Texas*, 441 U.S. 418, 429 (1979), and the fact that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts." *Estelle v. Smith*, 451 U.S. 454, 472 (1981) (citations omitted). But the shortcomings of psychiatry cannot excuse the failure to afford a former mental patient a hearing on his current mental competence for the purpose of overcoming a civil disability, where the government has been satisfied to rely on psychiatric evidence in imposing the disability in the first instance. That failure amounts to a denial of due process.

## CONCLUSION

The court does not today find it irrational to prohibit former mental patients generally from the purchase of firearms. The court finds rather that such a general prohibition is irrational and unconstitutional, if it does not include some provision for the granting of relief from disability to former mental patients in appropriate cases. As the defendant has noted, this court does not have the power to "create a review procedure for people in plaintiff's category," Defendant's Reply Mem. at 9, because "[t]hat would be a legislative function." The court can only declare those provisions of 18 U.S.C. § 921 *et seq.* which have been used to deprive plaintiff of his ability to purchase a firearm, without affording him any opportunity to contest that disability, to be void as violative of the fifth amendment of the United States Constitution.

The court does not mean to suggest by this opinion that all former sufferers of mental illness should be permitted to own firearms. But, rather, if Congress has determined that there are circumstances under which former criminals can own and possess weapons and a means is provided to establish such entitlement, former mental patients are entitled to no less. To hold otherwise is to implicitly declare that mental illness is incurable and that all those who have once suffered from it forever remain a danger to society. Such a conclusion is repugnant to our principles and is contradicted by the multitude of such persons who now live among us without incident. The anguish caused by mental illness is great enough without the imprimatur of a lifetime stigma embossed by congressional action.

Because the holding of the court in this matter will create a void in an area which clearly requires gov-



ernmental control and regulations, the court, on its own motion, will stay the effective date of its order for a period of 120 days, so as to afford to Congress an opportunity to correct the constitutional infirmities found to exist in the present legislation and to accord to former mental patients the rights, dignity and due process to which they are entitled.

/s/ H. Lee Sarokin  
H. LEE SAROKIN  
U.S.D.J.

Date: February 7, 1985

Original to Clerk, U.S. District Court

Copy to: Bianchi and Casale, Esqs.  
Peter R. Ginsberg, Esq.

## APPENDIX B

RE: Application for gun permit & Firearms Purchaser ID card  
on behalf of ANTHONY J. GALIOTO.

TO: Superior Court of New Jersey, Law Division, Essex County

## CERTIFICATION

I hereby certify that the following statements made by me are true:

1. I incorporated herein the contents of my letter of February 19, 1981, directed to Mr. Dante J. Mercurio.

2. The contents of N.J.S. 2C:58-3 (c) (3) have been brought to my specific attention. There is no doubt in my mind that Mr. Galimoto "is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms."

3. There is no doubt in my mind that he would handle all types of permitted firearms in a lawful manner.

4. Any representations made to the court by anyone else which would—directly or indirectly—indicate that my statements herein are not true are false and without substance.

Dated: 10 March 81

s/ R. G. Alvarez, M.D.

R. G. ALVAREZ, M.D.

Dated 6/4/82

s/ R.G. Alvarez, M.D.

R. G. ALVAREZ, M.D.



## APPENDIX C

### AMENDMENTS TO SECTION 925

Sec. 105. Section 925 of title 18, United States Code, is amended—

(1) in subsection(c)—

(A) by deleting the words “has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act)” and inserting in lieu thereof the words “is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition”;

(B) by inserting the word “transportation” after the word “shipment”;

(C) by deleting the words “and incurred by reason of such conviction,”, and

(D) by adding after the words, “the public interest,” the words “Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. In a proceeding conducted under this subsection, the scope of judicial review shall be governed by section 706 of title 5, United States Code. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice; and . . . .” Cong. Rec. S. 9179, July 9, 1985.

**AMICUS CURIAE**

**BRIEF**

3  
No. 84-1904

Supreme Court, U.S.  
FILED

OCT 7 1985

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
*Appellant,*

v.

ANTHONY J. GALJOTO,  
*Appellee.*

On Appeal from the United States District Court  
for the District of New Jersey

~~MOTION FOR LEAVE TO FILE~~ BRIEF AMICUS CURIAE  
IN SUPPORT OF MOTION TO AFFIRM AND  
BRIEF AMICUS CURIAE OF THE COALITION  
FOR THE FUNDAMENTAL RIGHTS  
AND EQUALITY OF EX-PATIENTS

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\* Counsel of Record



IN THE  
**Supreme Court of the United States**

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---

UNITED STATES DEPARTMENT OF THE TREASURY,  
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*Appellant,*

v.

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*Appellee.*

---

On Appeal from the United States District Court  
for the District of New Jersey

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
IN SUPPORT OF MOTION TO AFFIRM**

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Pursuant to Rule 36.1 of the Rules of the Supreme Court, the proposed *amici curiae*,\* participants in the

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\* The participants in the Coalition for the FREE are as follows:  
**NATIONAL MENTAL HEALTH ASSOCIATION**

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state

Coalition for the Fundamental Rights and Equality of Ex-Patients ("Coalition for the FREE") respectfully move for leave of this Court to file the attached Brief in Support of the Motion to Affirm in this matter.

divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

#### MENTAL PATIENTS' LIBERATION FRONT, INC.

Mental Patients' Liberation Front, Inc. ("MPLF") of Boston, Massachusetts was founded in 1971 and incorporated in 1975 as a not-for-profit Massachusetts corporation. The MPLF is a self-help mutual support and advocacy group run by and for people who have been clients of the mental health system.

#### SHARE OF DAYTONA BEACH, FLORIDA

SHARE of Daytona Beach, Florida, organized in January, 1980, is an unincorporated association in the process of being incorporated as a non-profit corporation in the State of Florida. SHARE's primary thrust is concerned with the rights of mental patients and former mental patients.

#### THE MENTAL PATIENTS' ASSOCIATION OF NEW JERSEY

The Mental Patients' Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a state-wide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

#### THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

#### THE MANDALA GROUP

The Mandala Group, formed in November, 1983 in Billings, Montana, is an ex-mental patient self-help and political action group, organized for the purposes of fighting discrimination and stigma and influencing legislation for the rights of mental patients.

Appellee, Anthony J. Galioto, by his counsel, has consented to this filing and this consent is being filed herewith. Appellant has not yet replied to our request.

The proposed *amici curiae*, participants in the Coalition for the FREE, are all organizations concerned about the rights of former mental patients. Many of the members of these organizations are themselves former mental patients, or are the family members and friends of such patients, or advocates for the mentally ill. The proposed *amici curiae* wish to participate in this case because of its potential precedential impact on the federal and state rights of former mental patients in this particular area and in the area of equal rights for former mental patients generally. It is the belief of the Coalition for the FREE that no other party or *amicus* will address the issues in this case with argument and research concerning the historical origins of the Second Amendment, English and American legislative history, and comparative law on the relationship between past mental illness and the provisions of 18 U.S.C. § 921 *et seq.*

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF THE COALITION  
FOR THE FUNDAMENTAL RIGHTS AND EQUALITY  
OF EX-PATIENTS IN SUPPORT OF MOTION  
TO AFFIRM**

**I. STATEMENT OF INTEREST OF AMICI CURIAE**

This case presents the question of whether a federal firearms statute may discriminate against former mental patients by denying them forever the opportunity to prove their recovery and rehabilitation for the purpose of keeping and bearing arms while permitting convicted felons to do so. The *amici curiae*,<sup>1</sup> participants in the

<sup>1</sup> The participants in the Coalition for the FREE are as follows:

**NATIONAL MENTAL HEALTH ASSOCIATION**

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

**MENTAL PATIENTS' LIBERATION FRONT, INC.**

Mental Patients' Liberation Front, Inc. ("MPLF") of Boston, Massachusetts was founded in 1971 and incorporated in 1975 as a not-for-profit Massachusetts corporation. The MPLF is a self-help mutual support and advocacy group run by and for people who have been clients of the mental health system.

**SHARE OF DAYTONA BEACH, FLORIDA**

SHARE of Daytona Beach, Florida, organized in January, 1980, is an unincorporated association in the process of being incorporated as a non-profit corporation in the State of Florida. SHARE's primary thrust is concerned with the rights of mental patients and former mental patients.

**THE MENTAL PATIENTS' ASSOCIATION OF NEW JERSEY**

The Mental Patients' Association of New Jersey was estab-



Coalition for the Fundamental Rights and Equality of Ex-Patients (the "Coalition for the FREE"), are all organizations concerned about promoting public understanding of mental health issues and protecting the rights of the mentally ill and of present or former mental patients. Members of these organizations include many former patients, their families, friends, and advocates for the mentally ill.

This case represents one of a number of issues of ex-patients' rights which are concerns of the participants in the Coalition for the FREE. Full participation by ex-patients as citizens means guaranteeing their equal rights to housing, employment, public services, and the rest of the full panoply of the benefits of our society. The Coalition for the FREE opposes all systematic denial of any rights, privileges, licenses, permits, or other official or unofficial indicia of equal status to American citizens solely on the basis of their status as former mental patients. The right to keep and bear arms by ex-patients admittedly is an emotion-charged and difficult issue to many, but equality in community-based housing and fair employment for ex-patients is just as emotion-charged and difficult to others. *Amici curiae*, participants in the Coalition for the FREE, did not choose to

lished in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

#### THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

#### THE MANDALA GROUP

The Mandala Group, formed in November, 1983 in Billings, Montana, is an ex-mental patient self-help and political action group, organized for the purposes of fighting discrimination and stigma and influencing legislation for the rights of mental patients.

litigate the issue of their right to be fairly treated as to their right to keep and bear arms. This case, however, has come before this Court nevertheless. Thus, *amici curiae* seek to be heard on this issue because of the potential precedential impact of this case on federal and state laws, both involving the right to keep and bear arms and other rights of former mental patients as well. The issues covered by this brief *amicus curiae* will consider matters relevant to this Court's deliberation not otherwise presented by the parties or other *amici*, including the historical origins of the Second Amendment, American and English legislative history, and comparative law on the issue of past mental illness and the right to keep and bear arms.

## II. SUMMARY OF ARGUMENT

In *Galioto v. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 602 F. Supp. 682 (D.N.J. 1985), the district court properly invalidated the federal firearms law that prohibits all former committed mental patients from ever being able to prove their recovery so as to overcome their statutory disability to acquire firearms. The federal law thereby improperly takes away from former patients forever one of the most fundamental individual rights of Americans. This right arose under the 17th-century English Bill of Rights and therefore existed long before the federal and state constitutional provisions guaranteeing this individual right to keep and bear arms under our laws. Because of the historic "fundamentality" of this right, under this Court's equal protection decisions, the highest level of judicial scrutiny must be applied to this statutory scheme. As the court below found, however, since the statute fails even the rational basis test, *a fortiori*, it fails the higher test.

Furthermore, by assuring that even convicted felons have the possibility of being rehabilitated for purposes of acquiring firearms, while totally denying such rehabilitation to former mental patients, the federal statutes

are a classic example of the irrational discrimination that still exists against many former patients' fundamental American rights. The legislative history of the statute and the available scientific research demonstrate the lack of any rational basis for this discrimination.

Accordingly, the district court opinion striking down the federal firearms law as irrationally discriminatory against former mental patients must be summarily affirmed by this Court to ensure full legal equality to former patients for this and all of their other constitutional and fundamental individual human rights. Otherwise, if the *Galioto* decision is reversed and the discriminatory federal firearms law upheld, this legal precedent could affect all former patients' rights, not only in this area but with regard to other important rights and privileges as well.

### III. ARGUMENT

#### A. The Judgment Below Should Be Summarily Affirmed To Ensure Ex-Patients' Fundamental Rights To Keep And Bear Arms

It is the position of *amici curiae* that the decision below should be summarily affirmed by this Court because, *inter alia*, that decision ensures the fundamental rights of former mental patients to keep and bear arms. This rationale provides an independent basis for this Court's summary affirmance. Both the district court decision<sup>2</sup> and the Government's Jurisdictional Statement<sup>3</sup> to this Court skirt this critical issue in the case—the status of the right to keep and bear arms as a “fundamental right” for the purpose of equal protection analysis of the statute.

<sup>2</sup> 602 F. Supp. above, at 686.

<sup>3</sup> See the Government's Jurisdictional Statement, at 18, n. 17 regarding this issue and *United States v. Miller*, 307 U.S. 174 (1939). As will be more fully discussed below, the “fundamentality” of the right to keep and bear arms is one of a number of issues not even discussed in *United States v. Miller*.

This Court has long held that a right may be deemed “fundamental” for this analysis only if it is “explicitly or implicitly guaranteed by the Constitution.” *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1, at 34 (1973). For the purpose of meeting such a standard, there could hardly be a more explicit guarantee than the following, well-known wording of the Second Amendment guaranteeing the right to keep and bear arms:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to Keep and Bear Arms, shall not be infringed.

By directing its attention, for equal protection purposes, largely to the parallel issue of the scrutiny of *who* may be denied the statutory right to keep and bear arms, the district court did not address the strict level of scrutiny also required by the nature of the fundamental constitutional right involved in this case.

Moreover, apart from explicit rights, beginning with its seminal decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court has traditionally also required strict scrutiny of statutes affecting fundamental rights such as the “penumbral” right of privacy and the “guardian” right of suffrage. See *e.g.* *Griswold v. Connecticut*, 381 U.S. 479 (1964); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). As Justice Brennan has noted:

The test of “fundamentality” is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. *San Antonio Ind. School District v. Rodriguez*, 411 U.S. at 62-63 (Brennan, J., dissenting).

Thus, on both bases—by explicit constitutional guarantee and by its close nexus to other fundamental rights—the right to keep and bear arms is clearly entitled to the highest degree of judicial scrutiny.

Alternatively, the right to keep and bear arms requires the intermediate level of scrutiny applied to the



right of education by this Court in *Plyler v. Doe*, 457 U.S. 202 (1983). The district court, by applying the lower "rational basis" test, demonstrated that, *a fortiori*, the challenged provision of 18 U.S.C. § 925(c) clearly failed both of the higher tests of "compelling" and "substantial" governmental interests. In further support of that conclusion by the district court, the *amici* will now provide this Court with the basis for determining that the right to keep and bear arms is "fundamental" according to the "traditions and conscience of our people." *Griswold v. Connecticut*, 381 U.S. at 493 (Goldberg, J., concurring).

As a starting point, it must be emphasized that the Second Amendment guarantee of the citizen's right to keep and bear arms was just that—a *guarantee* of an acknowledged, pre-existing right—and not the *grant* of a new one. This Court has historically recognized that distinction as to the Bill of Rights generally<sup>4</sup> and as to this right in particular.<sup>5</sup> Specifically, the right being guaranteed thereby was the Englishman's individual right to keep and bear arms pursuant to the 1689 English Bill of Rights, which provided as follows in its seventh article:

[T]he Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law. 1 W. & M., Sess. 2, ch. 2 (1689).

In its prior case law touching on the issue of the Second Amendment,<sup>6</sup> this Court had not yet had the benefit of the most recent scholarship on the origins of the

<sup>4</sup> *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); See also Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 G. Mason U.L.R. 1, at 39-40 (1981).

<sup>5</sup> *Id.*

<sup>6</sup> See *United States v. Miller*, 307 U.S. 174 (1939). See also *United States v. Cruikshank*, 92 U.S. 542 (1876) and *Presser v. Illinois*, 116 U.S. 252 (1886).

individual right to keep and bear arms.<sup>7</sup> Thus, to the extent that *Cruikshank*, *Presser*, and *Miller* are even relevant here at all, their relevance is largely as to what issues they did *not* decide or even consider. Consequently, one of the issues before this Court for the first time in this case is the level of scrutiny to be applied to a statute affecting the right to keep and bear arms as a fundamental right guaranteed explicitly by the Constitution. None of the cases cited, nor any other legal authority on the issue, specifically addresses and definitively answers the question of the fundamental nature of the individual right to keep and bear arms guaranteed in the Second Amendment.

Recent academic scholarship has documented the individual origins of that right with increasing conclusiveness.<sup>8</sup> It is now clear that the Englishman's individual right to keep and bear arms was the very wellspring of the Second Amendment's guarantee.<sup>9</sup> Thus, because of this new research—notwithstanding the several "myths" about meaning of the Second Amendment<sup>10</sup>—

<sup>7</sup> See, in particular, Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," 10 Hastings Con. L.Q. 285 (1983). See also generally, the list of articles on the Second Amendment and the right to keep and bear arms, in Appendix "A" attached hereto.

<sup>8</sup> *Id.* See also Shalhope, "The Ideological Origins of the Second Amendment," 69 J. of Amer. His. 599 (1982).

<sup>9</sup> See, for an excellent tracing of that history, Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Univ. of New Mexico Press, 1984). See also, for a shorter version of that history, Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," 10 N. Ky. L. Rev. 13 (1982).

<sup>10</sup> See e.g. Malcolm, 10 Hasting Const. L. Q. above at 306, thoroughly documenting the English Bill of Rights "individual" right to arms as a reaction to royal attempts to disarm Protestants, refuting Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," 2 Hastings Const.



the issue of the English and American individual right to keep and bear arms *vel non* can now be readily distinguished from the issue of the right to bear *specific* types of arms in both rationale and case law. It is that individual right—extant a century before 1789—which must be the constitutional touchstone for determining the “traditions and conscience of our people”<sup>11</sup> with regard to the “fundamentality” of this right for equal protection purposes and the level of scrutiny required here.

Given the nature of English society, the English right to keep and bear arms was not absolute. The right, it has been suggested, was not extended to the legally disabled: felons or the young.<sup>12</sup> Finally, and most relevantly, a traditional disability extended to “lunatics” or “idiots”.<sup>13</sup> The English legal tradition, how-

L.Q. 961 (1974) (“It should be pointed out that the King did not disarm Protestants in any literal sense. . . .”) Id. at 973.

See also, Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” 82 Mich. L. Rev. 204 (1983) refuting the exclusivity of the right to the states’ militia as earlier described in Feller and Gotting, “The Second Amendment, A Second Look,” 61 Northwest, U.L. Rev. 46 (1966).

<sup>11</sup> See *Griswold v. Connecticut*, 381 U.S. at 493 (Goldberg J., concurring).

<sup>12</sup> See Dowlut, “The Right to Arms: Does the Constitution or the Predilection of Judges Reign?”, 36 Okla. L. R. 65, 96 (1983).

<sup>13</sup> See e.g., Dowlut and Knoop, “State Constitutions and the Right to Bear Arms,” 7 Okla. City U.L.R. 177, 191, n. 71 (1982). See also Dowlut, 36 Okla. L.R. at 96 and Malcolm, 10 Hastings L.Q. above, at 310.

In addition to restrictions on those suffering from mental illness, as with other subjects of discrimination, the right to bear arms was also a prerogative earlier withheld from various racial, religious, and ethnic groups. See Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Univ. of New Mexico Press, 1984) at 107 *et seq.* (blacks); at 234, n.5 (native American Indians). See also Caplan, “The Right of the Individual to Bear Arms: A Recent Judicial Trend,” 1982 Det. Col. L. R. at 794 (re: the 1181 English Statute of Assize of Arms prohibiting arms possession by Jews), and Malcolm, 10 Hastings L.Q. above,

ever, is also clear that the legal disability of at least one part of the mentally disabled class, “lunatics,” was not to be considered perpetual, as it is under the statute challenged here.<sup>14</sup> Indeed, modern English parallels continue to provide both for firearms disabilities based on mental illness and for opportunities for removal of such

at 306-7, concerning discrimination against Catholics and Protestants regarding the English right to arms.

<sup>14</sup> See e.g. 1 W. Blackstone, *Commentaries* 317-318 (E. Christian ed. London 1793-95) (“For the law always imagines that these accidental misfortunes may be removed . . . (T)he King shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind. . . . On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason. . . .”; 4 W. Blackstone, *Commentaries* 25 (“It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses. . . .”) See also, An Act concerning the Prerogative of the King in the Preservation of the Lands of Lunatics, 17 Edward II, st. 2, ch. 10:

Also the King shall provide, when any (that before time both had his wit and memory) happen to fail of his wit, as there are many *per lucida intervalla*, that their lands and tenements shall be safely kept without waste and destruction. . . . to be delivered unto them *when they come to right mind . . .*; (emphasis added).

Highmore, *A Treatise on the Law of Idiocy and Lunacy* (London, 1807):

Yet in the eyes of the law, a lunatic is never to be looked upon as desperate, but always at least in a possibility of recovering. . . . (p. 65) “A lunatic is never to be looked upon as irrecoverable. . . .” (p. 105);

Brydall, *Non Compos Mentis, or the Law Relating to Natural Fools, Mad-Folks and Lunatick Persons*, (London, 1700) at p. 68:

“(U)nless, the Testator were besides himself, but for a short time . . . not continually for a long space, as for a month or more; or unless the Testator fell into some Frenzy upon some accidental Cause which Cause is afterwards taken away; or unless it be a long time since the Testator was assaulted with the Malady; *for in these cases the Testator is not presumed to continue in his former Furor, or Frenzy.*” (emphasis added).

firearms disabilities.<sup>15</sup> Thus, even if the English legal tradition has long acknowledged the reality of both temporary and long-term mental disability, it has also recognized the need for providing an opportunity for the recovery and rehabilitation of the formerly mentally ill as to their fundamental rights.

Even if this Court were to conclude that the right to keep and bear arms is not a "fundamental right" for equal protection purposes, there is an alternative ground for requiring a higher or intermediate level of scrutiny of the statute involved here. It has been suggested<sup>16</sup> that this Court has adopted a "continuum" or "spectrum" of scrutiny for various rights and interests, ranging from the fundamental rights already described above to other rights not specifically traceable or even directly implicated by constitutional provisions, or so-called "quasi-fundamental rights."<sup>17</sup>

Given the historical and philosophical background of the right to keep and bear arms—quite apart from its textual and legal foundations—this Court should now at

<sup>15</sup> See Part II B below for a discussion of modern English firearms statutes as they relate to mental disability and appeals from denials of firearms certificates on that basis.

<sup>16</sup> See e.g. Comment, "*Plyler v. Doe*: the Quasi-Fundamental Right Emerges in Equal Protection Analysis", 19 N. Eng. L. J. 151 (1983-84); Hutchinson, "More Substantive Equal Protection? A Note on *Plyler v. Doe*", S. Ct. Rev. 167 (1982). See also, *J.W. v. City of Tacoma*, 720 F.2d 1126, 1128 (9th Cir. 1983):

The legislative classification at issue in *Plyler* affected a group that was not a suspect class and did not impinge on a fundamental right. Because, however, the affected group possessed some of the characteristics of a suspect class, and the benefit denied to the group was, if not fundamental, important, the Court concluded that heightened scrutiny was appropriate. (emphasis added).

<sup>17</sup> *Id.*, see also *San Antonio Ind. School District v. Rodriguez*, 411 U.S. at 62-63 (Brennan J., dissenting) and at 102-03 (Marshall, J., dissenting); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3260-1 (1985) (Stevens, J. and Burger, C.J., concurring) and at 3265 (Marshall, J., dissenting).

least equate this right with other quasi-fundamental rights, such as education, as a bare minimum for determining the appropriate level of scrutiny required. Again, as with the "fundamental rights" analysis above, the application of even the minimally heightened level of scrutiny, heretofore associated with such "quasi-fundamental" rights as public education, must also inevitably result in this Court's rejection of the statutory rationale involved herein.

Thus, quite apart from whether or not this Court would adopt an equal protection analysis based on the "quasi-suspect" class issue, the statute would clearly fail the higher levels of scrutiny required by this Court's recognition of either the "fundamental" or "quasi-fundamental" nature of the constitutional right to keep and bear arms.

*Amici curiae* now turn to a consideration of the lack of even a modicum of rationality to the statute's discrimination against former mental patients.

**B. The Judgment Below Should Be Summarily Affirmed Because There Is No Rational Basis For The Discrimination Against Ex-Patients in 18 U.S.C. § 921 *et seq.***

The district court properly concluded that 18 U.S.C. § 921 *et seq.*, by its complete denial of former mental patients' ability to prove recovery so as to acquire firearms, violated equal protection guarantees. 602 F. Supp. above, at 691. The basis for the district court's holding was that the statute improperly failed to provide any opportunity for rehabilitation of former patients while providing for such rehabilitation of felons. *Id.* The district court also found that the statutory class of former mental patients was a "quasi-suspect" class justifying an intermediate level of scrutiny. 602 F. Supp. above, at 687. Since the statute lacked even a rational basis, however, the district court's opinion did not rely on the "quasi-suspect" class holding. *Id.*



The district court was correct in both respects, i.e., as to the "quasi-suspect" nature of the discriminatory classification of "former mental patients" and as to the lack of even a rational basis for the discrimination against former patients in the firearms statute.

Historically, those committed to mental institutions in New Jersey and elsewhere have been both isolated and neglected.<sup>18</sup> The "stigma" of having been committed to a mental institution follows former patients out into the community where many former patients have now been relegated to their own "ghettoes" because of the difficulty of locating community group homes in residential neighborhoods,<sup>19</sup> and to other treatment indicative of an "underclass."<sup>20</sup> Virtually every aspect of discrimination that has been visited upon "suspect" racial, religious, and gender-based groups can also be seen in its own special analogue unique to this underclass: "former mental patients."<sup>21</sup> The issue of equal entitlement to licenses and privileges for former patients is clearly one aspect of this historic discrimination.<sup>22</sup>

<sup>18</sup> See e.g., *In re Grady* 85 N.J. 235 (1981); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *Addington v. Texas*, 441 U.S. 418, 425-6 (1979); and *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

See also *Staff Report on the Institutionalized Mentally Disabled Requested by Senator Lowell P. Weicker, Jr., Prepared for Joint Hearings by the U.S. Senate Subcommittee on the Handicapped, Committee on Labor and Human Resources and the Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Committee on Appropriations* April 13, 1985.

<sup>19</sup> See, e.g., *J.W. v. City of Tacoma*, 720 F.2d at 1129. See also Note, "Mental Illness, A Suspect Classification," 83 Yale L. J. 1237 (1974).

<sup>20</sup> See, e.g., *Plyler v. Doe*, 457 U.S. at 234 (Blackmun, J., concurring).

<sup>21</sup> See n. 18 above.

<sup>22</sup> See, as examples of license conditions or rights limited by mental disabilities or illness: 75 Pa. C.S.A. § 1503(4) (driver's license); 63 P.S. § 421.15 (physician's license); 63 P.S. § 224(2) (nurse's license); 10 U.S.C. § 504 (enlistment in armed forces).

As former mental patients began to be released in large numbers<sup>23</sup> back into the community,<sup>24</sup> there have been widespread expressions of concern about their potential for "dangerousness" and violence.<sup>25</sup> This public

<sup>23</sup> The Appellee was an inpatient in a private psychiatric hospital for 23 days. 602 F. Supp. above at 684. With regard to the length of his inpatient treatment, the nature of the facility, and his involuntary commitment, the Appellee is fairly typical of the class of "former mental patients" in this country. For example, in 1975, NIMH reported that 54% of admissions to state and county mental hospitals for inpatient care were for 28 days or less. National Institute of Mental Health, *Characteristics of Admissions to Selected Mental Health Facilities*, (1975). An Annotated Book of Charts and Tables, at 99, DHH Pub. (ADM) 81-1005, Sup. of Doc. U.S. G.P.O., Wash., D.C. The percentage of admissions for less than one month to private hospitals was 66%. *Id.* NIMH reported that the median days of stay for 1975 was 25.5 days in state hospitals and 20.2 in private facilities. *Id.* at 96. For the same year, the NIMH Division of Biometry and Epidemiology estimated that in 1975 a total of 789,000 persons with mental disorders received treatment in state and county mental hospitals and 233,000 in private hospitals. The estimate for V.A. psychiatric hospitals was 351,000. Regier, Goldberg and Taube, "The De-facto U.S. Mental Health Service System," 35 Arch. Gen. Psych. 685, at 688 (1978). Types of commitment by legal status were not reported for that period in the 1970's, but the current percentages reported by NIMH in 1985 are that 51.1% of admissions to state and county facilities are involuntary, as are 12.5% of admissions to private hospitals. NIMH, *Mental Health, United States*, 1985 (Monograph in press) at p. 45. In short, based just on these statistics, the Appellee is clearly one of at least several hundred thousand "former mental patients" affected by the firearms statute. Moreover, estimates of the total number of Americans who have been, or will be committed to mental hospitals have been as high as 10% of the total population. See n. 28 below as to the sources of this estimate.

<sup>24</sup> See Steadman and Felson, "Self-Reports of Violence," 22 Criminology 321, at 22 (1984) (The authors date the problem as arising "since 1965 and the advent of massive deinstitutionalization programs").

<sup>25</sup> See, e.g., *J.W. v. City of Tacoma*, 720 F.2d above at 1129. See also, Steadman and Felson, "Self Reports of Violence," 22 Criminology 321 (1984) ("Media reports of ex-mental patients tend to focus on their involvement in violent crime and bizarre behavior." *Id.*). Steadman and Felson concluded:



concern about former mental patients has stimulated many recent academic and scientific studies of such populations.<sup>26</sup> Based on these studies, there is simply no

According to these self-reports, ex-offenders engage most frequently in aggressive behavior at all levels of severity and are more likely to injure their antagonist. Ex-mental patients are more likely than the general population to use weapons and to be involved in hitting disputes, although the data in regard to hitting disputes were somewhat mixed. No differences were observed between ex-patients and the general population in the tendency to injure the antagonist or in the frequency of more mild forms of aggression. Thus ex-mental patients appear only slightly more likely to engage in the most serious forms of violence than the general population. The strong negative stereotype of them as dangerous and violent persons appears to be unsupported. *Id.* at 340.

<sup>26</sup> The earlier studies have been summarized and criticized in two articles: Rabkin, "Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research," 86 Psychol. Bull. 1, 26 (1979) ("Based on the limited evidence available, I conclude that patients discharged from mental hospitals are not, by virtue of their psychiatric disorders or hospitalization experience, more prone to engage in criminal activity than are people demographically similar [who do not have such history]. . . ."); and Cohen, "Crime Among Mental Patients—A Critical Analysis," 52 Psych. Quar. 100 (Summer 1980) ("Until more carefully controlled studies are performed, we must be circumspect in imputing any special degree of criminality to the discharged mental patient").

The more current studies have been similarly considered in Slobogin, "Dangerousness and Expertise," 133 U.Pa.L.Rev. 97 (1984) ("One psychological factor that does not clearly correlate with violence is mental illness. Although the linkage between mental disorder and dangerousness is assumed to exist by the public, research indicates that prisoners do not appear to have higher rates of severe mental illness than demographically comparable groups in the community. Moreover, mentally ill patients do not appear to be any more violent than the non-mentally ill who have comparable histories of violent behavior." [citing J. Monahan, *The Clinical Prediction of Violent Behavior* (N.I.M.H. Monograph, 1981)]) *Id.* at 120, n. 88. Professor Slobogin also notes the particular "false positive" rates of experts' predictions of dangerousness included in the leading studies. *Id.* at p. 110, n. 50.

In a recent television program concerning a well-publicized domestic crime committed by a recently released mental patient, the

factual support for the "archaic" and "stereotypic"<sup>27</sup> characterization of former patients as particularly dangerous or violent.<sup>28</sup> In particular, there is also simply no basis for discriminating against former patients regarding firearms while providing convicted felons with the opportunity for obtaining firearms.<sup>29</sup>

The legislative history of Title I of the Gun Control Act of 1968 (which amended Title IV of the earlier Omnibus Crime Control and Safe Streets Act of 1968) is similarly devoid of any evidentiary rationale for disabling former patients. What the record of the hearings and floor debates does, in fact, document is the legislators' fear of those labeled "mentally ill."<sup>30</sup> The overwhelming number of congressional references to the issue of mental illness—apart from references to the language of the bills themselves—is to those who are currently

Columbia Broadcasting System aired a statement disclaiming any characterization of the dangerousness of the mentally ill: "(T)he majority of whom never commit a violent act. Indeed, they are not more prone to violence than the non-mentally disordered." CBS, "Murder by Reason of Insanity," Oct. 1, 1985.

<sup>27</sup> *J.W. v. City of Tacoma*, 720 F.2d at 1129.

<sup>28</sup> See Hardy and Stompoly, "Of Arms and the Law," 51 Chi-Kent L. Rev. 62, at 96-97 (1974). ("In addition to being ineffective, the use of prior commitment records may create serious inequities. Approximately 10% of all Americans will be committed at one time during their lives." (citing statement of A. Wiley at the *Hearings on the Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. p. 1 (1963) and B. Ennis, *Prisoners of Psychiatry* (1972) at vii)).

<sup>29</sup> See n.24 above, Steadman and Felson, *op. cit.* and Slobogin, *op. cit.*

<sup>30</sup> "The demented, the deranged, mentally incompetent individual is a frequent purchaser", 114 Cong. Record 21812 (1968) (remarks of Rep. Schwengel); "mental cases", *id.* at 22262 (remarks of Rep. Fisher); "the mentally deranged", *id.* at 21791 (remarks of Rep. Thompson).

"mentally ill" or "mentally sick",<sup>31</sup> "psychotics",<sup>32</sup> "psychopaths",<sup>33</sup> the "mentally or emotionally disturbed,"<sup>34</sup> "lunatics" and other similar terms seemingly referring only to those *presently* mentally ill.<sup>35</sup> From the perspective of 1985—17 years of mental health progress after those debates and hearings—the meaning and language of the legislators is far from clear or precise. Again, what is clear is the legislators' difficulty in identifying a concise, ready-made catchall for the entire class of persons to be summarily declared perpetually disabled on "mental" grounds.<sup>36</sup> Thus, the congressional choice to exclude all persons who had ever been committed was not a rational one in the first instance, nor was its per-

<sup>31</sup> "The mentally ill", *id.* at p. 22752 (remarks of Rep. Boland), "the mentally sick", *id.* at p. 22751 (remarks of Rep. Reid).

<sup>32</sup> *Id.* at p. 21838 (remarks of Rep. Lloyd).

<sup>33</sup> *Id.* at p. 21835 (remarks of Rep. Gilbert), *id.* at p. 23091 (remarks of Rep. Donahue).

<sup>34</sup> *Id.* at 27420 (remarks of Sen. Cannon).

<sup>35</sup> "Lunatics", *id.* at p. 22747 (remarks of Rep. McClory); "mentally irresponsible", *id.* at 21780 (remarks of Rep. Sikes); "mentally, morally and legal incompetent", *id.* at 27152 (remarks of Sen. Dodd).

<sup>36</sup> From the quotes in the six foregoing footnotes, it is readily apparent that there is very little real consistency in the congressional language on this issue and certainly not the apparent agreement in congressional purpose suggested by the Jurisdictional Statement's legislative citations at pp. 12 and 20-21. Indeed, two of the quotations therein, 114 Cong. Rec. 13868 and 14773 (remarks of Sen. Long) concern Title VII, *not* Title IV, of the Omnibus Crime Control and Safe Streets Act of 1968. Even the Jurisdictional Statement's own choice of legislative citations are to terms which vary widely from "mental disturbance" 114 Cong. Rec. 21829 (1968) (remarks of Rep. Bingham) to the above quoted "psychopaths", *Id.* at 21835 (remarks of Rep. Gilbert).

The earlier congressional hearings also betray a similar confusion about the class of persons intended to be prohibited from firearms ownership because of mental disabilities. See, e.g., *Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 90th Cong. 1st Sess. (1967) "psychopaths" p. 151 (statement of Sen. Hruska); "emotionally unstable persons" p. 158 (statement of Sen. Robert Kennedy); "dangerous psychopaths" p. 417 (statement of Sen. Church).

petual disqualification of that group.<sup>37</sup> The legislative history of § 925(c), as it pertains to the class of former patients, thus supports the district court's finding of a lack of rationality.

This Court has had several opportunities to comment in passing on the rationale for Congress' exclusions from firearms ownership.<sup>38</sup> None of these earlier opinions, however, focused on the underlying history and lack of

<sup>37</sup> Section 925(c) was based on the early administrative relief provision that was enacted in 1965 to permit convicted individual or corporate felons to continue to conduct activities involving firearms. Pub. L. No. 89-184, 79 Stat. 788. The case in point, cited in the Senate Report, involved a corporation which had pled guilty to a non-firearms felony involving only its pharmaceutical division but which would nevertheless thereby have lost its ability to deal in firearms through its weapons division. See Senate Report 666, 89th Cong., 1st Sess., 2-3 (1965). See also, Jurisdictional Statement, p. 10, n. 8 for another, somewhat less detailed, statement of this history.

<sup>38</sup> As the court below noted (602 F. Supp. at 687-8), this Court referred to the challenged disabilities in its opinion in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983). This *dicta* is hardly controlling here however, as the lower court held. 602 F. Supp. at 687. Similarly inconclusive are this Court's previous passing references to these issues in *Lewis v. United States*, 445 U.S. 55, 65, n.8 (1980), *United States v. Batchelder*, 442 U.S. 114, 119 (1979), *Scarborough v. United States*, 431 U.S. 563, 571-2 (1977), *Barrett v. United States*, 423 U.S. 212, 219-21 (1976), *Huddleston v. United States*, 415 U.S. 814, 824 (1974), and *United States v. Bass*, 404 U.S. 336, 345 (1971). Finally, in *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting), it was suggested that psychiatric testing might be an appropriate gun control technique. See also, Hardy and Stompoly, 51 Chi.-Kent L. Rev., at p. 97 for other citations on this issue. Clearly, however, none of these cases are controlling precedent here.

In fact, to the extent that these cases concern the removal *vel non* of the felony disability, they only serve to reinforce the statutory disparity between convicted felons and committed mental patients. Unlike felons, patients cannot be "pardoned" either by states' governors or by the President. See 27 C.F.R. § 178.42 and *Dickerson v. New Banner*, 460 U.S. at 114, n. 10 as to the "automatic enabling effect" of a presidential pardon of a felon. "Expungement" under state law of patients' commitment and records obviously also does not suffice for patients under *Lewis v. United States*, 445 U.S. above.



evidentiary support for the complete and unappealable exclusion of Galito and his class.<sup>39</sup> This Court and other courts have repeatedly considered the parallel exclusion of felons and the *sui generis* procedures for their rehabilitation, particularly in the context of pardons and expungements. Again, as previously noted, the historical background of the felony exclusion and pardon provisions seems to have contributed in large part to the present statutory anomaly.<sup>40</sup> Nevertheless, understanding the history and its almost random pattern neither excuses the discrimination nor provides a better, fairer rationale for future operations of the Bureau of Alcohol, Tobacco and Firearms under the statute.

In summary then, this Court should treat this matter as one hardly justifying its time and attention because of the obvious fault in the statutory scheme. Whether examined under the rubric of a "fundamental right" or a "quasi-fundamental" right or, alternatively, as involving a "quasi-suspect" class, the statute must fall as irrational. No one—least of all the *amici*—would urge the availability of firearms completely without reference to present mental illness. By providing for administrative relief, a hearing and/or an appeal process for former mental patients, the current Senate and House Bills,<sup>41</sup> some existing state laws,<sup>42</sup> and the modern English parallels<sup>43</sup> have all adopted more rational approaches to

<sup>39</sup> *Id.*

<sup>40</sup> See n. 37 above.

<sup>41</sup> S. 49, Sec. 105 and H.R. 945, Sec. 105, 99th Cong., 1st Sess.

<sup>42</sup> The appellee was able to obtain relief under New Jersey's statutory provisions. 602 F. Supp., at 684. See Appendix "B" for a table of state laws regarding mental illness and firearms licenses, and appeals from denials, etc.

<sup>43</sup> The English Statute of Assize of Arms, art. 3 (1181) prohibited the possession of all coats of mail or breastplates by Jews, as noted in Caplan, "The Right of the Individual to Bear Arms" 1982 Det. Col. of L.R. 789, at 794.

The Statute of Northampton, 2 Edw. 3, ch. 3, forbid riding or going about with weapons in affray of the peace.

[Continued]

the firearms/mental disability issue than the statutes challenged here.

<sup>44</sup> [Continued]

The Gun License Act of 1870, 33 & 34 Vict. ch. 57, required all guns to be licensed, voiding licenses for conviction of certain game laws.

The Pistols Act, 1903, 3 Edw. 7, ch. 18, (this is the earliest English arms statute researched that specifically refers to mental illness), provided as follows: "5. Any person who shall knowingly sell a pistol to any person who is intoxicated or is not of sound mind shall be liable to a penalty. . . ."

The Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43, Section 1 required firearms certificates to be issued by the chief district police officers except "to a person whom the chief officer of police has reason to believe . . . to be a person of intemperate habits or unsound mind. . . ." Section 1(4) of the statute, however, also provided that "(a) any person aggrieved by a refusal of a chief officer of police to grant him a firearm certificate . . . may appeal in accordance with rules made by the Lord Chancellor. . . ." Section 1(6) provided for revocation of the certificate of those of "unsound mind" and also for appeals therefrom. Section 5 provided penalties for anyone who shall "sell a firearm or ammunition to or repair, prove, or test a firearm or ammunition for any person whom he knows, or has reasonable ground for believing, to be drunk or of unsound mind."

The Firearms Act, 1937 (1 Edw. 8 and 1 Geo. 6, ch. 12). Section 2 (2) of the Act continued the earlier 1920 law denying issuance of gun certificates to persons of "unsound mind", Section 2 (7) provided for revocation of the licenses of persons of "unsound mind" and Section 2 (8) also provided for appeals by persons aggrieved by such denial or revocations. Finally, Section 20 continued the prohibition of sales, transfer, repairs and tests of firearms for or to persons of "unsound mind."

The Firearms Act, 1968, ch. 27. Section 25 prohibits selling, transferring, repairing, proving or testing firearms for or to persons of "unsound mind." Section 26 requires gun certificates and provides for appeals from denials of grants or renewals. Section 27 prohibits the granting of firearms certificate to persons of "unsound mind." Section 30 provides for revocation of the certificate of a person of "unsound mind" and for appeals therefrom.

The Firearms Act of 1982, ch. 31. The 1982 Act continues the provisions of the 1968 Act regarding firearms certificates, denials, revocations, appeals, and prohibition of sales (etc.) regarding persons of "unsound mind."



**CONCLUSION**

Based on the foregoing, *amici curiae* respectfully urge this Court to affirm summarily the judgment of the district court below.

Respectfully submitted,

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\* Counsel gratefully acknowledges the assistance of J. Benedict Centifanti, Law Clerk, in the preparation of this Brief.

# **APPENDICES**

## APPENDIX A

BIBLIOGRAPHY OF LAW REVIEW ARTICLES,  
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MENT AND THE RIGHT TO KEEP AND BEAR  
ARMS

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## APPENDIX B

STATE FIREARMS STATUTES REGARDING  
MENTAL DISABILITIES AND  
REHABILITATION

ALABAMA Code of AL § 13A-11-76	Delivery of pistol prohibited to persons of unsound mind
ARIZONA * AZ Rev. Stat. Title 13 § 13-3101 (5) (a)	Possession of weapon prohibited for person found to constitute a danger to himself/others pursuant to court order and whose court ordered treatment has not been terminated by court order
ARKANSAS AR. Stat. Ann. § 41-3103 (b)	Possession of firearm prohibited for person adjudicated mentally defective
CALIFORNIA Welfare & Institutions Code § 8100	Possession of firearm prohibited for person who is a patient in a mental hospital
Penal Code § 12072 & Welfare Code § 8101	Sale or transfer of firearm prohibited for person who is a patient in a mental hospital
DELAWARE * DE Code Ann. Title 11 § 1448	Weapon possession prohibited for person committed to hospital for mental disorder unless he possesses certificate from doctor stating that he no longer suffers from the mental disorder
WASH. D.C.* D.C. Code Title 6 § 6-2313 (6)	No firearms registration certificate shall be issued to person who within the last 5 years was confined to a mental hospital provided he can present medical certification that he has recovered

\* States with provision for relief from disability.

D.C. Code  
Title 22 § 22-3207

FLORIDA \*  
FL Stat. Ann.  
Chapter 790  
§ 790.06 (3)

FL Stat. Ann.  
Chapter 790 § 790.17

FL Stat. Ann.  
Chapter 790  
§ 790.25 (2) (b) (1)

GEORGIA \*  
Off. Code of GA Ann.  
§ 16-11-129 (b) (4)

ILLINOIS  
IL Stat. Ann.  
Title 38 § 24-3 (e) &  
(f) § 24-3.1 (5) & (6)

IL Stat. Ann.  
Title 38 § 83-8 (e)

INDIANA  
IN Stat. Ann.  
§ 35-23-4.1-6

IOWA  
IA Code Ann.  
§ 724.10

LOUISIANA  
LA Rev. Stat. Ann.  
§ 28.183

Sale of pistol to person of unsound mind prohibited

No license to carry concealed will be issued to person adjudged mentally incompetent unless that person possesses a certificate from a doctor stating he no longer suffers from that disability.

Furnishing of weapon to person of unsound mind prohibited

Possession of firearm prohibited for person of unsound mind

No license to carry a pistol will be issued to a person hospitalized in a mental hospital in the last 5 yrs unless probate judge decides circumstances surrounding the hospitalization not sufficient to deny the license

Sale of firearm to and possession of firearm by person of unsound mind prohibited

Application for a firearm owner's identification card denied to person who has been mental patient in last 5 yrs

Sale or transfer of handgun to person of unsound mind prohibited

Application for permit to carry asks if person has history of mental illness

Furnishing a weapon to a patient of a mental institution prohibited

\* States with provision for relief from disability.

MAINE ME Rev. Stat. Ann. Title 25 § 2032(C) (6) (e)	Application for permit to carry concealed asks if person ever committed to mental institution
MARYLAND Ann. Code of MD Article 27 § 445(b) & (c)	Sale or transfer to and possession by person of unsound mind prohibited
MASSACHUSETTS * MA Gen. Laws Ann. Chapter 140 § 129(B) (b)	Prohibited from obtaining application for firearms identification card if ever confined to mental institution unless he can submit an affidavit from a doctor stating disability won't affect firearm possession
MICHIGAN MI Compiled Laws § 28.422(1)	No pistol license will be issued to person adjudged insane
MINNESOTA * MN Stat. Ann. § 624.713(c)	Possession of pistol prohibited for mentally ill person unless he possesses a certificate from a doctor stating that he is no longer suffering from that disability
MISSISSIPPI MS Code Ann. § 49-7-19	Unlawful to issue a hunting license to person who is mentally unfit
MISSOURI Ann. MO Stat. § 571.090(1) (6)	Permit to acquire firearm denied if adjudged mentally incompetent
Ann. MO Stat. § 571.070(2)	Possession of a concealable firearm prohibited for person adjudged mentally incompetent
NEW JERSEY NJ Stat. Ann. Title 2C Chapter 39 § 2C:39-7	Possession prohibited for person committed to mental institution unless he possesses a certificate from doctor stating that he no longer suffers from that disability

\* States with provision for relief from disability.

NJ Stat. Ann. Title 2C Chapter 58 § 2C:58-3(c) (8)	Permit to purchase handgun denied to person who has ever been confined for a mental disorder unless he possesses a certificate from a doctor stating that he is no longer suffering from that disability
NEW YORK Con. Laws of NY Ann. Penal Law § 265.00(16)	Definition of person not suitable to possess firearms includes persons adjudicated mentally incompetent
NORTH CAROLINA Gen. Stat. of NC § 14-258.1(a)	Furnishing weapon to mental patient prohibited
NORTH DAKOTA ND Cent. Code Title 62 § 62-01-04(2)	Possession of pistol prohibited by person who is emotionally unstable
OHIO * OH Rev. Code Ann. § 2923.13(A) (5)	Possession of firearm by person adjudged mental incompetent is prohibited unless he is relieved from disability under § 2923.14
OKLAHOMA OK Stat. Ann. Title 21 § 1289.10	Furnishing of firearm to mentally incompetent prohibited
PENNSYLVANIA PA Stat. Ann. Title 50 § 4605(2)	Furnishing a weapon to a person committed to a mental institution prohibited
RHODE ISLAND * Gen. Laws of RI Title 11 Ch. 47 § 11-47-6	Possession of firearm by mental incompetent prohibited, however, he may make an application to purchase if he has been out of confinement for 5 yrs and can present affidavit from doctor
SOUTH CAROLINA Code of Laws of SC § 16-23-30(a)	Delivery of pistol to person adjudicated mental incompetent is prohibited

\* States with provision for relief from disability.



8a

TENNESSEE  
TN Code Ann.  
Title 39 Ch. 6  
§ 39-6-1704(b)

Sale of firearms to person of unsound  
mind prohibited

TN Code Ann.  
Title 33  
§ 33-317(b)

Furnishing weapons to patients of  
mental institutions prohibited

UTAH  
UT Code  
§ 76-10-503(1)

Possession of firearm by mental in-  
competent prohibited

WASHINGTON  
Rev. Code of WA Ann.  
Title 9 § 9.41.080

Delivery of pistol to person of un-  
sound mind prohibited

WEST VIRGINIA  
WV Code § 27-12-3

Transfer of firearm to a patient in a  
mental institution prohibited

9a

# TABLE OF STATE FIREARMS STATUTES REGARDING MENTAL DISABILITY

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RELIEF FROM DISABILITY:

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Idaho  
Kansas  
Kentucky  
Montana  
Nebraska  
Nevada  
New Hampshire  
New Mexico  
Oregon  
South Dakota  
Texas  
Vermont  
Virginia  
Wisconsin  
Wyoming

Arizona  
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Washington, D.C.  
Florida  
Georgia  
Massachusetts  
Minnesota  
New Jersey  
Ohio  
Rhode Island

## STATES WITH STATUTES REGARDING PROHIBITIONS ON WEAPONS/FIREARMS

### DELIVERY/TRANSFER SALE/FURNISHING

California  
Florida  
Illinois  
Louisiana  
Maryland  
North Carolina  
Oklahoma  
Pennsylvania  
Tennessee  
West Virginia  
Rhode Island  
Utah

### POSSESSION

Arizona  
Arkansas  
California  
Delaware  
Florida  
Maryland  
Missouri  
New Jersey  
New York  
Ohio

### DENIAL OF LICENSE/PERMIT/ APPLICATION/FOID \*

Washington, D.C.  
Florida  
Illinois  
Iowa  
Maine  
Massachusetts  
Mississippi  
Missouri

## STATES WITH STATUTES REGARDING PROHIBITIONS ON HANDGUNS/PISTOLS

### DELIVERY/TRANSFER SALE/FURNISHING

Alabama  
Washington, D.C.  
Indiana  
South Carolina  
Washington

### POSSESSION

Minnesota  
North Dakota

### DENIAL OF LICENSE/PERMIT/ APPLICATION/FOID \*

Georgia  
Michigan  
New Jersey

\* Firearm owner's identification card.

**AMICUS CURIAE**

**BRIEF**

FILED

OCT 7 1985

JOSEPH F. SPANIOL, JR.  
CLERK

NO. 84-1904

In The  
**Supreme Court of the United States**

October Term, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Appellant,*

vs.

ANTHONY J. GALIOTO

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE  
PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH  
ADVOCACY AS AMICUS CURIAE IN SUPPORT OF  
RESPONDENT

On the Brief and  
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**BEST AVAILABLE COPY**

38P8



i  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1985

\_\_\_\_\_  
No. 84-1904  
\_\_\_\_\_

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Appellant

v.

ANTHONY J. GALIOTO

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF NEW JERSEY  
\_\_\_\_\_

MOTION BY THE NEW JERSEY DEPARTMENT  
OF THE PUBLIC ADVOCATE, DIVISION OF  
MENTAL HEALTH ADVOCACY TO PARTICIPATE  
AS AMICUS CURIAE IN SUPPORT OF  
RESPONDENT GALIOTO  
\_\_\_\_\_

The New Jersey Department of the  
Public Advocate [hereinafter the Depart-  
ment], respectfully moves this Court for  
leave to file the attached brief as amicus  
curiae in this case. The consents of the  
petitioner, United States Department of  
the Treasury and respondent Anthony Galioto,  
have been given. Written consents will  
be forwarded immediately upon receipt.

The attached brief is submitted in support of respondent Galioto.

The Department is a cabinet-level agency of New Jersey state government. N.J.S.A. 52:27E-2. The Department's Division of Mental Health Advocacy was established to represent "... indigent mental hospital admittees ..." in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "... an issue of general application to them." N.J.S.A. 52:27E-25.

The interest of the Department in this case arises from its regular participation as counsel for individuals facing civil commitment to mental hospitals in New Jersey. The Division, established in 1974, has had the unique experience of both witnessing and participating in

substantial changes in practice and procedure with respect to civil commitment proceedings.\* Indeed, since its inception in 1974, the Division has represented 43,809 clients in individual matters, of which approximately 80% were commitment and periodic review hearings. The long-standing and extensive involvement of the Division in the civil commitment process renders it uniquely qualified to participate as amicus curiae. Specifically, amicus will provide the Court with a comparison of the civil commitment process at the time Anthony Galioto was committed to Fair Oaks Hospital and the present. Amicus will submit that the procedures for

---

\* The Department has participated before this Court as amicus curiae in a number of other cases in this area. See, e.g., Ake v. Oklahoma, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1007 (1985); Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); and Kremens v. Bartley, 431 U.S. 119 (1977).



notice and hearing at the time of Galioto's confinement in New Jersey in 1971 substantially differ from the wide array of substantive and procedural due process protections mandated in New Jersey today. These mechanisms demonstrate the irrationality of a scheme which strips a person of his constitutional right to have and bear arms solely because of psychiatric hospitalization fourteen (14) years ago, when that hospitalization resulted from procedures which were totally devoid of due process protections. The District Court's order should be affirmed.

For the above reasons, it is respectfully submitted that the motion for leave to file the annexed brief as amicus curiae should be granted.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1985

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No. 84-1904

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UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Appellant

v.

ANTHONY J. GALIOTO

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
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BRIEF FOR THE  
NEW JERSEY DEPARTMENT OF THE PUBLIC  
ADVOCATE, DIVISION OF MENTAL HEALTH  
ADVOCACY

AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT

---

INTEREST OF AMICUS CURIAE

The New Jersey Department of the  
Public Advocate, Division of Mental Health  
Advocacy [hereinafter the Division] sub-  
mits this brief in support of Respondent  
Anthony Galioto's motion to affirm or  
dismiss the decision of the Court below.  
The Division, a statutory portion of the



cabinet level Department<sup>1</sup> is mandated to provide representation to "indigent mental hospital admittees"<sup>2</sup> in matters pertaining to their "admission to, retention in, or discharge from" mental hospitals in the State. N.J.S.A. 52:27E-24. In fulfillment of this obligation, the Division provides legal representation to residents of nine of New Jersey's counties on 7,700 matters per year.<sup>3</sup> As such, the Division has a substantial interest in this Court's consideration of any statute that completely and irrevocably bars persons who have received inpatient mental health treatment from enjoying

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<sup>1</sup> N.J.S.A. 52:27E-2.

<sup>2</sup> N.J.S.A. 52:27E-23.

<sup>3</sup> This figure includes not only initial commitment hearings, but also periodic reviews of civil commitments, commitments of persons found not guilty by reason of insanity or incompetent to stand trial and other issues affecting persons with involvement in the mental health system.

rights or privileges held by other residents of the State. The District Court (Hon. H. Lee Sarokin) found such a statutory scheme a violation of the Fifth Amendment in light of Congress' failure to make the same provisions for rehabilitation of former patients that they had afforded to convicted felons. Amicus submits that such a scheme is manifestly irrational, particularly when the changes in practice and procedure in civil commitments in New Jersey over the past fifteen years are considered.

#### SUMMARY OF ARGUMENT

Substantial changes have been implemented in the process of civil commitment since the time Anthony Galioto entered Fair Oaks Hospital in 1971. While the statute governing civil commitment remains the same, New Jersey courts have

made significant strides in revising the procedure used for civil commitment and to ensure due process and meet constitutional and statutory standards. At present, New Jersey adheres to the following mandates: a) civil commitment now requires a finding that the patient is a danger to himself or to others, b) persons in New Jersey cannot be involuntarily confined to a mental hospital without a hearing at which they are present, c) adequate notice of hearings is required, and d) patients must be represented by counsel at the hearing concerning civil commitment. Given these protections, it is questionable whether Anthony Galioto and thousands of other New Jersey residents involuntarily committed prior to the revisions in the commitment law would be subject to involuntary civil commitment today. These mechanisms highlight the



irrationality of a statute which imposes an insurmountable presumption of dangerous and continuing mental illness on persons who have received inpatient mental health services, at some point in the past, under circumstances bereft of due process.<sup>4</sup> Moreover, the challenged statute impermissibly imposes a civil penalty because of their status as ex-patients, without regard to present ability to responsibly handle firearms.

---

<sup>4</sup> Galioto's present competence to handle firearms has been determined by the New Jersey courts. N.J.S.A. 2C:58-3, [establishing procedures whereby, inter alia, persons with a history of mental health treatment, both as inpatients and outpatients may demonstrate present ability to handle firearms].

ARGUMENT  
CIVIL COMMITMENT IN NEW JERSEY HAS  
CHANGED RADICALLY SINCE 1971

Civil commitment, the predicate for a firearms disability under 18 U.S.C. §922, has changed substantially since Galinto entered Fair Oaks Hospital. Due process protections, imposed on the initiative of the New Jersey Supreme Court,<sup>5</sup> at least

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<sup>5</sup> New Jersey's civil commitment statute, N.J.S.A. 4:30-23 et seq. enacted in 1965, forms the foundation for the process, and has remained relatively unchanged for the past twenty years. The Rules of Court which implement the process have been radically modified. The Court Rule 4:74-7, entitled "Commitment of Insane," in existence in 1971 [hereinafter the "1971 Rule" and attached at 1a] was supplemented by a directive by New Jersey Supreme Court Chief Justice Richard J. Hughes in 1974 [hereinafter the "Directive" and attached at 4a]. In 1976, the 1971 rule and the Directive were supplanted by the present Court Rule, entitled "Civil Commitment", governing civil commitment procedure which provided additional due process safeguards [attached at 8a]. As a result of these changes, persons in New Jersey are no longer subject to involuntary hospitalization without a finding of danger to self or others, without counsel or without a hearing. These changes in practice support the District Court's determination that the statutory scheme is irrational and unconstitutional.

in part a response to the Court's decisions in the area, now require that there be a finding that the patient would be a danger to self or to others prior to civil commitment, that an actual hearing be held concerning civil commitment and that the patient be present at the hearing and provided with adequate notice and, finally, that the patient be represented by court-appointed counsel at the hearing concerning commitment.<sup>6</sup>

The reasons for these changes were described as follows by the New Jersey Supreme Court when the greatly expanded procedural due process protections were instituted in 1975:

A general revision of the rule [governing civil commitment] was clearly required in order to correct a long standing history of procedural abuses

---

<sup>6</sup> Voluntary commitments are made by application to the facility. N.J.S.A. 4:30-46. No court order or demonstration of dangerousness is required for voluntary treatment. Voluntary treatment may become involuntary confinement following a request for discharge if a court determines probable dangerousness under this standard. See, N.J.S.A. 30:4-48.



in the civil commitment process and to insure that no person may be involuntarily committed to a psychiatric institution without having been afforded full procedural due process. The adoption of this rule reflects an increasing national and state-wide concern for the situation of persons suffering from mental illness and a growing realization that, traditionally, persons alleged to be suffering from mental illness have been involuntarily committed on ex parte orders entered without representation by counsel, without adequate notice, without adequate proofs, and generally in violation of the most fundamental concepts of due process. See, generally, Note, Developments in the Law - Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974). See also O'Connor v. Donaldson, 43 U.S. Law Week, 50 (June 24, 1975); In the Matter of the Application for the Commitment of Geraghty, 68 N.J. 209 (1975).

S. Pressler, New Jersey Court Rules, Comment to Rule 4:74-7, paragraph 1.

It is impermissible for firearms disability to be conclusively presumed from admission to a psychiatric hospital, since the procedural due process protections

afforded persons admitted to psychiatric hospitals in 1971 were virtually nonexistent. Had the more stringent due process protections which exist today existed in 1971, many persons would have been able to avoid involuntary hospitalization and the resulting firearms disability. To strip a person of his constitutional right to have and bear arms solely because of psychiatric hospitalization, when that hospitalization resulted from procedures which were totally devoid of due process protections, is to bottom a rights denial upon an illusory and infirm foundation.

A. CIVIL COMMITMENT IN NEW JERSEY  
NOW REQUIRES A FINDING OF  
PROBABLE DANGER TO SELF OR  
OTHERS, NOT MERELY THAT THE  
PERSON IS MENTALLY ILL

Involuntary civil commitment in New Jersey must now be based on a judicial determination that the person is "... a danger to himself or others or property

if he is not so confined and treated." Present R.4:74-7(f). In contrast, at the time Galioto was committed and between 1965 and 1975, people were routinely committed if determined to have "... mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community."<sup>7</sup> N.J.S.A. 30:4-23. See also, N.J.S.A. 30:4-27.

In 1975, this Court determined that under the Constitution:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining

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<sup>7</sup> Similarly, the 1971 Court Rule required the Court to determine whether the person was "... insane and a proper person to be confined in one of the institutions for the insane in the State ..." 1971 Rule 4:74-7(g) at 3a.



such persons involuntarily if they are dangerous to no one and can live safely in freedom.

O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). As a result, civil commitments made under the statute where only mental illness was determined became constitutionally suspect. See, id. at 576.

The New Jersey Supreme Court construed the state commitment statute in 1975 to require a finding of danger to self or others prior to civil commitment.<sup>8</sup>

State v. Krol, 68 N.J. 236 (1975).

Between 1965 and 1975 persons were incarcerated in mental hospitals, without a finding that they presented any risk to anyone. Required forms, such as the application for commitment, physician's

---

<sup>8</sup> This was the first judicial construction of the 1965 commitment statute. The court noted that prior to its enactment, a finding of probable danger had been required for civil commitment. State v. Krol, 68 N.J. 236, 252 (1975).

•

certificates in support of the application or the forms of order made no reference to evaluation of or opinion of the individual's danger to self or others,<sup>9</sup> but focused solely on mental illness.

Thousands of New Jersey residents were committed under the constitutionally defective process in place in New Jersey

---

<sup>9</sup> The effects of the practices were most succinctly described in the comments by Hon. Sylvia Pressler to the present Rule:

[N]one of the commitment forms prepared by the Department of Institutions and Agencies (correctly designated Department of Human Services by the 1978 amendment) and approved by the Administrative Office of the Courts prior to the adoption of the 1975 rule required any such specific statement in the physician's certificate or forms of orders and, in fact, both temporary and final commitment orders were routinely entered without the finding of probable danger either made or noted. This provisions of the rule was significantly modified by the 1976 amendment.

S. Pressler, New Jersey Court Rules, comments to Rule 4:74-7, p.919, paragraph 3 (1985).

from 1965 to 1975. Today they are entitled, under the Constitution, to a judicial determination that they are a danger to themselves, others or property, and to have that determination made on the basis of clear and convincing evidence.<sup>10</sup> Imposing a conclusive disability on such a questionable determination can serve no legitimate purpose.

B. CIVIL COMMITMENT IN NEW JERSEY  
NOW REQUIRES A FORMAL HEARING,  
WITH ADEQUATE NOTICE AND REPRESENTATION BY COUNSEL

Civil commitment in New Jersey now requires a formal hearing, with adequate notice and representation by counsel. This is a substantial change. Prior to 1976, for all practical purposes, people were confined indefinitely to mental hospitals with only a sham of due process.

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<sup>10</sup> The standard of proof for civil commitment in New Jersey, previously a "preponderance of the evidence," is now "clear and convincing." See, *In re Scelfo*, 178 N.J.Super. 394 (App. Div. 1979) adopting *Addington v. Texas*, 441 U.S. 418 (1979).



In 1971, hearings regarding civil commitment were the exception rather than the rule. Patients were provided with a maximum of one day's notice of the hearings.<sup>11</sup> The notice contained a provision instructing the patient to respond if he or she objected to the commitment.<sup>12</sup> "[I]f there was no response to the notice of hearing, then a final order was routinely signed on an ex parte basis." S. Pressler, New Jersey Court Rules, comment to R.4:74-7, paragraph 6. This order was entered traditionally on the basis of certifications made in the application for temporary

---

<sup>11</sup> 1971 Rule 4:74-7(e) [1a-2a].

<sup>12</sup> The required written notice contained a provision that "... if the patient desires to oppose the application for a final judgment of commitment, he may appear personally or by attorney at the time and place fixed for the final hearing." 1971 Rule 4:74-7(e)[1a].

commitment.<sup>13</sup> As a result, individuals were committed without having been before the court, without examination by a psychiatrist, and without adequate notice of the proceedings. Thus, "... it was not unusual, in fact, for a permanent order to be signed ex parte after the release of the patient from the institution," Id.

This practice is in direct contrast to today's recognized constitutional minimums, which require due process protections before an individual is subjected to the stigma and loss of liberty inherent in civil commitment. Eg., Addington v.

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<sup>13</sup> An application for involuntary commitment must be supported by a written certificate signed by two physicians (not necessarily psychiatrists) "... set[ting] forth that the condition of the patient is such as to require care and treatment in a mental hospital ..." N.J.S.A. 30:4-29, N.J.S.A. 30:4-30 (contents of certificate).

Texas, 441 U.S. 418 (1979), Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254 (1980).

Today, hearings in all cases are required<sup>14</sup> regardless of whether or not the patient requests one. R.4:74-7(e). The are held on ten days' notice. R.4:74-7(c)(3), rather than one. Oral testimony of a practicing psychiatrist who has examined the patient after the application has been made is required, where no testimony was required before. N.J.Ct.R. 4:74-7(f).

Finally, New Jersey now requires the appointment of counsel in the commitment process.<sup>15</sup> N.J.Ct.R. 4:74-7(f). Previously, no process for appointments of counsel

---

<sup>14</sup> Hearings are required to periodically review commitments, an innovation initiated by Chief Justice Hughes. Directive at 6a.

<sup>15</sup> Intermediate New Jersey courts had recognized the importance of counsel, but no process of regular or routine appointments existed. McCorkle v. Smith, 100 N.J.Super. 595 (App. Div. 1968). See also, In re Gannon, 123 N.J.Super. 104 (County Court 1973).



existed. Persons in the hospital were unable to secure legal assistance, were unrepresented at their commitment hearings, and generally were without knowledge of their legal rights and remedies.<sup>16</sup>

In short, they were not provided with any access to competent independent assistance in the commitment process<sup>17</sup> and were certainly not given the benefit of representation by counsel that exists today. At present, all persons subject to civil commitment are represented by an attorney, whether it is the Public Advocate or by court-appointed counsel.

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<sup>16</sup> Patient contact with family or counsel was at the determination of the hospital medical director under the statute. N.J.S.A. 30:4-41.

<sup>17</sup> Vitek v. Jones, 445 U.S. 480, (1980) (plurality opinion).

CONCLUSION

New Jersey's civil commitment process has undergone a major overhaul in the past two decades. Those changes raise substantial questions about the validity of thousands of civil commitments.<sup>18</sup> The federal statute, which makes no provision for rehabilitation from disability, subjects these persons to a denial of rights without regard to the validity of the underlying procedure. The District Court has determined the scheme to be irrational.

---

<sup>18</sup> Because the records of commitments prior to 1974 are incomplete, Directive 4:74 at 4a, it is not possible to compare commitments in New Jersey in 1971 and 1985. A study in Virginia, however, found that the adoption of a "dangerousness" standard reduced the institutional population from 17,000 to 10,000 of which only 700 were involuntarily confined. See, Choper, "Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights," 83 Mich.L.Rev. 1, 145 (1985).

For these reasons, the decision of the District Court should be summarily affirmed.

Respectfully submitted,

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Assistant Deputy  
Public Advocate

DATE: October 7, 1985



1a

APPENDIX

4:74-7. COMMITMENT OF INSANE<sup>1</sup>

(a) Definitions.

\*\*\*

(b) Form of Application. An action for [the] commitment...shall be commenced by filing an application in writing to which shall be attached the certificate in writing of 2 physicians. Forms in commitment proceedings shall be those prescribed by the Department of Institutions and Agencies, subject to the approval of the Administrative Director of the Courts.

(c) Filing Time for Hearing.

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(d) Order of Temporary Commitment.

\*\*\*

(e) Notice. If the patient is not confined in an institution before the final

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<sup>1</sup>Source: Rules Governing the Courts of the State of New Jersey (1971 ed.)

hearing, the applicant shall personally serve upon the patient or his attorney written notice of the time and place of final hearing, at least one day before the date fixed. If the patient is confined in an institution before the final hearing, the county adjuster shall serve upon the patient personally a written notice of the time and place of final hearing, at least one day before the date fixed.... The notice shall contain a statement that if the patient desires to oppose the application for a final judgment of commitment, he may appear personally or by attorney at the time and place fixed for the final hearing.

(f) Hearing.

\*\*\*

(g) Final Judgment at Commitment. After the proofs have been taken and the matter heard (whether before or after the temporary commitment of the patient as provided by

law), and if the court finds the person to be insane and a proper person to be confined in one of the institutions for the insane in the State, it shall make a final judgment of commitment. The judgment shall contain a determination of insanity, the names of the certifying physicians, and a recital of the notices of inquiry given and shall designate the place to which the patient shall be finally confined until restored to reason or discharged or until the further order of a court of competent jurisdiction....



November 12, 1974

MEMORANDUM TO: All Assignment Judges,  
Trial Court Admin-  
istrators and County  
Clerks

FROM: Chief Justice Richard J.  
Hughes

RE: Involuntary Civil Commitment  
Proceedings

A study recently conducted by the Administrative Office of the Courts indicates that there is a lack of uniformity among the counties in regard to the docketing procedures being followed in civil commitment cases. A great divergence of practice occurs in involuntary proceedings, where in many instances, papers are not filed until after the final judgment of commitment. (See N.J.S.A. 30:4-56). In addition, lack of adequate docketing procedures has permitted uncontrolled administrative adjournments so the court does not have a written record of the patient's confinement. When notice is filed in the County Clerk's Office,

5a

no docket number has been assigned for further control.

In order to standardize procedures throughout the State, all involuntary civil commitment cases shall be handled in the manner described below.

1. DOCKETING

\*\*\*

2. ASSIGNMENT OF CASES

\*\*\*

3. SCHEDULING OF CASES

\*\*\*

4. WRITTEN NOTIFICATION OF HEARING

...Written notification shall be served personally upon the patient in accordance with N.J.S.A. 30:4-41.

In all instances mentioned above, written notification shall be transmitted no later than 5 days prior to the date of the hearing.

5. ADJOURNMENT POLICY

\*\*\*

6. CHANGE IN PATIENT'S STATUS

\*\*\*

7. PERIODIC REVIEW

\*\*\*

8. PATIENT'S RIGHT TO APPEAR

It shall be the responsibility of the Assignment Judge to assure that in all instances in which a hearing has been scheduled, that the patient be given every opportunity to appear. If the medical director or chief of service of the mental hospital feels that in his expert opinion it would be prejudicial to the health of the patient, or unsafe to produce the patient at the inquiry, then it shall be the obligation of the medical director or chief of service to certify in writing to the court his expert opinion concerning the patient's inability to appear, setting forth the facts supporting his conclusion. The hearing judge shall evaluate any certification submitted and determine



7a

whether the personal appearance of the patient is feasible. (See N.J.S.A. 30:4-41).

The policy and procedures set forth in this memorandum shall take effect immediately.

cc: County Counsels  
County Adjusters  
Department of Institutions  
and Agencies

4:74-7. CIVIL COMMITMENT<sup>3</sup>(a) Definitions.

\*\*\*

(b) Commencement of Action. ...If the patient is an adult, the certificates shall state with particularity the facts upon which the physician relies in concluding that the patient if not committed would be a probable danger to himself or others or property...

(c) Temporary Commitment.

\*\*\*

(d) Discovery.

\*\*\*

(e) Hearing. No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral

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<sup>3</sup> Source: Rules Governing the Courts of the State of New Jersey (1985 ed.).

testimony of at least one psychiatrist licensed in any one of the United States who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se. (Emphasis added).



(f) Final Judgment of Commitment,  
Review.

The court shall enter a judgment of commitment to an appropriate institution if it finds from the evidence presented at the hearing that the institutionalization of the patient is required by reason of his being a danger to himself or others or property if he is not so confined and treated ...

(g) Judgment of Release.

\*\*\*

(h) Legal Settlement.

\*\*\*

(i) Filing.

\*\*\*

(j) Institutionalization of Minors.

\*\*\*

# **JOINT APPENDIX**

5  
No. 84-1904

Supreme Court, U.S.

FILED

JAN 9 1986

ROSE E. SPANGLER, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU  
OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT

v.

ANTHONY J. GALIOTO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

**JOINT APPENDIX**

MICHAEL A. CASALE  
*Bianchi and Casale*  
575 Kingsland Street  
Nutley, New Jersey 07110  
(201) 667-8500  
*Counsel for Appellee*

CHARLES FRIED  
*Solicitor General*  
Department of Justice  
Washington, D.C. 20530  
(202) 633-2217  
*Counsel for Appellant*

**BEST AVAILABLE COPY**

JURISDICTIONAL STATEMENT FILED JUNE 5, 1985  
PROBABLE JURISDICTION NOTED NOVEMBER 4, 1985

24/pt



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\* The opinion and judgment of the district court and the notice of appeal were attached as appendices to the jurisdictional statement and are not reproduced herein.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-2045

ANTHONY J. GALIOTO, PLAINTIFF

v.

THE DEPARTMENT OF THE TREASURY, BUREAU OF  
ALCOHOL, TOBACCO AND FIREARMS, DEFENDANT

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>NR</u>	<u>PROCEEDINGS</u>
/24/84	1	Complaint, filed.
/24/84		Summons issued. (60)
/24/84	2	Notice of Allocation and Assignment, filed. (Newark-Sarokin)
6/5/84	3	Motion and clerk's order specially appointing Michael A. Casale, Esq. to serve the summons and complt. on deft., filed 6/4/84.
6/28/84	4	Aff. of serv. of copy of summons and complt. on U.S. Atty's Office on 6/11/84, with copy of summons thereto, fld. 6/27/84.
6/28/84	5	Aff. of serv. of copy of summons and complt. on Stephen E. Higgins & U.S. Atty. General on 6/15/84, fld. 6/27/84.
/14/84	6	Stip. and order extending time for deft. to ans. complt. to 9/10/84, fld. (Sarokin) N/M
10/11/84	7	Notice of motion by deft to dismiss the complaint or alt. for summary ju. ret. 10/9/84, and Cert. of Service, filed 9/10/84. (Brief submitted).
10/24/84		Hearing on defts motion to dismiss complaint or for summary judgment. DECI-

<u>DATE</u>	<u>NR</u>	<u>PROCEEDINGS</u>
		SION RESERVED, the Court to treat the foregoing as cross motions for summary judgment. Ordered briefs to be filed within 10 days. (Sarokin) (10/22/84).
10/31/84	8	<i>Transcript</i> of proceedings held on 10/22/84, fld. 10/30/84.
/7/85	9	Opinion fld. (Sarokin) (denying def't's motion for dismissal; granting summary judgment in favor of pltf.; staying action for 120 days)
/7/85	10	Order denying def't's motion for dismissal or in alternative summary judgment; granting summary judgment in favor of pltf. and staying action for a period of 120 days, fld. (Sarokin) n/m.
/8/85	11	Notice of direct appeal of def't., to the Supreme Court of the U.S., fld. 3/7/85 at 5:00P.M. & cert. of service.
/8/85		Copies of notice of appeal sent to Supreme Court.
/6/85	12	Order continuing effective date of the Court's order of 2/7/85 pending final resolution of the Supreme Court, fld. 6/4/85 (Sarokin) n/m.
11/12/85	13	Certified copy of order of the Supreme Court noting probable jurisdiction, fld. 11/4/85.
12/12/85		RECORD SENT TO U.S. SUPREME COURT.

## STATE OF NEW JERSEY

Certificate For Hospitalization (under Title 30: N.J.S.A.)  
County of Essex

Request For Admission of Anthony J. Galioto  
To: Fair Oaks Hospital

The undersigned Antoinette Galioto of 22 N. Westwood Dr., West Orange in the County of Essex and State of New Jersey hereby makes application for admission to the Fair Oaks Hospital and hospitalization therein, of Anthony Galioto of the County of Essex and State of New Jersey. The said Anthony Galioto was born on 11/19/28 at Bloomfield, in the County of Essex, and State of New Jersey, and County [sic] of U.S.A., and is by occupation a Civil Engineer (Traffic).

Marital Status—Married. Citizen—Yes.

Education: (highest grade completed) 4 college—some  
Post Grad

Name of Father—Antonino (deceased); birthplace—  
Sicily.

Maiden name of mother—Sorce (living); birthplace—  
Sicily.

The place or places in which the said patient resided during the ten years immediately preceding the date of the application are:

22 N. Westwood Dr., West Orange. [From] 1/59 to present.

Names, relationship, and addresses of the next of kin of said patient are:

Antoinette—Wife—22 N. Westwood Dr., WO 07052—  
RE1-7138

Rosaria Galioto—Mother—47 Bloomfield Ave., WO—  
PI8-0268

Michael Galioto—Brother—53 Carlos Dr., Fairfield—  
227-5810

Social Security No. \_\_\_\_\_. Is patient receiving any benefits? No.

If so, specify (Pensions, VA, Social Security) .....



Hospitalization Insurance: Pru Company (Blue Cross, etc.) \_\_\_\_\_ and Number: 3260.

Military service: Army & Air Force Dates: Army (1945-46) Air Force (1950-1952)

Type of Discharge: Honorable VA Claim Number: \_\_\_\_\_ Date: May 11, 1971.

Name of person making application: Antoinette Galimoto  
Relationship or Position: Wife

Street and Number: 22 N. Westwood Dr.

Town or City: West Orange Zip Code: 07052

County of Essex, State of New Jersey.

Telephone Number (include area code) (201) 731-7138.

/s/ ANTOINETTE GALIMOTO  
(Signature of applicant)

### Certificate of Mental Illness

I, Reinaldo G. Alvarez, M.D. of 30 Indiana Road, Somerset, Somerset [County], New Jersey, Medical License No. 22633 of New Jersey do hereby certify that I personally examined Anthony Galimoto on the 13th day of May, 1971. I am not the director, chief executive officer or proprietor of any institution for the care and treatment of the mentally ill to which application for admission is being prepared; nor am I a relative, either by blood or marriage of the patient. My staff appointment to the receiving hospital is staff psychiatrist.

The following is a description of the patient: Anthony Galimoto; 22 N. Westwood Dr., West Orange; date of birth: 11/19/28; height: 5'11"; weight: 170; color: W; sex: M; marital status: M; color of eyes: \_\_\_\_\_; color of hair: redish.

The following is a report of my medical findings:

1. History of Relevant Previous Illnesses (include mental illness) and/or previous hospitalizations: No history of previous hospitalizations or out pt. psychiatric care. Pt. had been attending group encounters.

2. History of onset of present illness including predisposing factors: Pt. became very delusional one week before admission, not making sense, for one month he had been withdrawn and preoccupied about the group encounters.

3. Mental Status (Describe in detail the patient's behavior, appearance and manner. State what the patient said.) Very delusional, disoriented at times, unable to relax, preoccupied to his inner thoughts, agitated and assaultive on occasions unable to reason with. Generally impaired judgment no insight. Hostile towards wife. Associations become loose at times.

4. Additional facts and circumstances (including facts communicated by others) upon which my judgment is based: Destructive against property at home[,] unable to work or care for himself[,] argumentative and delusional.

5. If applicable, carefully delineate and describe any destructive, homicidal or suicidal behavior; depression, violence or excitement. Becomes very agitated and assaultive when overwhelmed by delusional material. Unable to control himself.

6. Medications (give all known information about medically prescribed or self-administered use of medications or toxic substances.) Prolixin - Thorazine

7. History of Use of Alcohol. Some.

8. Describe the patient's physical findings; physical status; vital signs; blood pressure; laboratory data, please forward abstract copies of medical reports.

Heart - NSR                      no (m)                      BP 160/80

lungs - clear

abd - soft    mild hypertension

*Imp:* Involutional paranoid state

On the basis of the foregoing, I believe that the condition of this person is such as to require evaluation, care and treatment in a mental hospital.

/s/ R. G. ALVAREZ, M.D.

A

ESSEX COUNTY JUVENILE AND DOMESTIC  
RELATIONS COURT

In the matter of the commitment to Fair Oaks Hospital  
of ANTHONY J. GALIOTO, alleged to be mentally ill

FINAL ORDER OF COMMITMENT

I, having examined a copy of the application in writing, certificates of Reinaldo G. Alvarez, M.D. and Teoman Koc, M.D. two duly qualified physicians, and the temporary order of commitment for admission to and confinement in Fair Oaks Hospital at Summit of Anthony J. Galioto as a mentally ill patient, a copy of said application, certificates and order having been certified by the Medical Superintendent of said Hospital under his hand and seal of said institution, and it appearing therefrom that said patient is mentally ill and a proper person to be confined in one of the institutions for the mentally ill of this State.

I DO SO FIND AND DETERMINE: and it further appearing by proof of service now submitted that notice of time and place of final hearing was given as required by law to said patient, it is on this 31st day of May 1971.

ORDERED, that said Anthony J. Galioto be finally committed to said Fair Oaks Hospital as a mentally ill patient until restored or removed or discharged according to law.

Approved as to form and (SIGNATURE)  
statutory requirements - JUDGE  
Frank A. Palmieri, Essex  
County Adjuster.

by: /s/ JOHN D. KELIV  
John D. Keliv  
Assistant County Adjuster

FAIR OAKS HOSPITAL  
SUMMIT, NEW JERSEY

CONFIDENTIAL

Patient's Name: Mr. Anthony Galioto  
Address: 22 North Westwood Drive, West Orange, N.J.  
Home Phone: RE1-7138  
Age: 42  
Admission Date: May 11, 1971  
History No. 21,514

DISCHARGE SUMMARY: JUNE 4, 1971

This patient is a 42 year old white married ambulatory male who was admitted to Fair Oaks Hospital for the first time on a voluntary basis on May 11, 1971. There was no previous history of hospitalization or psychiatric treatment. It was known at the time of admission that the patient had been attending sensitivity group encounters in New York and that during the past month the patient had become very seclusive and withdrawn. During the week prior to admission the patient became extremely psychotic, delusional and assaultive at home, destroying part of the house when he could not control his anxiety and became overwhelmed by his delusions.

On admission the patient was cooperative although very tense and suspicious. He was very guarded in his statements and preoccupied by his inner thoughts, with some degree of confusion in the expression of his thoughts. Pressure of speech was present. Shortly after his admission to the hospital the patient became extremely violent, resistive and unable to control his emotions. The patient signed a 72 hour notice to leave the hospital and had to be regularly committed on May 13, 1971.

On admission the patient's physical examination was essentially normal except for a mild degree of hypertension with blood pressure of 160/80 and some ec-

chymotic areas in the right arm secondary to an intramuscular injection. His admission EKG. was within normal limits. Admission x-ray of the chest showed no pulmonary consolidation or pleural reaction; the left ventricular appeared full. X-rays of the spine showed some reactive sclerosis at the level of L5-S1. Admission SMA-12 was within normal limits. Serology was nonreactive. Urinalysis was essentially normal except for a slight amount of bacteria with no clinical significance. Admission c.b.c. was normal, and repeat W.B.C. on June 1 was also normal. During his stay in the hospital the patient's physical condition remained normal.

The patient was initially treated with Prolixin 1 mg. q.i.d., Thorazine 100 mgs. t.i.d., Artane 5 mgs. b.i.d., multivitamins, Thorazine I.M. p.r.n., and Dalmane 30 mgs. h.s. Eventually his Prolixin was increased to 2.5 mgs. t.i.d. and his Thorazine to 150 mgs. q.i.d. The patient was started on Electro Convulsive treatments on May 21, receiving a total of 7 treatments while in the hospital. The patient was eventually moved to one of the open wards and granted full ground privileges. He became involved in occupational therapy and was no behavioral problem whatsoever. He was also able to go home on a weekend visit, with good results from this visit.

PERSONAL HISTORY

*Early Development*—The patient was born November 19, 1928, in Bloomfield, New Jersey. At the time of his birth his mother was 43 and his father 53. As described by the informants, the patient was raised by both parents in a financial situation described as secure. Early childhood was considered to have been both warm and happy, free of undue pressure and sibling rivalry. Disciplinary measures, usually carried out by the father, were strict in nature. In describing the patient's early childhood characteristics, the informants stated that although stubborn and strong willed he was both affectionate and friendly. Early development was uneventful.



*Education*—The patient is a graduate of Newark College of Engineering where he received his B.S. degree. The patient has also done postgraduate work (traffic engineering) at Yale University.

*Employment*—For the past 18 years the patient has been employed as a traffic civil engineer at the New York Port Authority. He last went to work on Friday, May 7, 1971.

*Military Service*—Between 1945 and 1946 the patient served in the United States Army. In addition, between 1950 and 1952 the patient served in the United States Air Force. Discharge in both cases was honorable.

*Marital Data*—The patient was married October 31, 1954, to Antoinette Bianchi, age 41, a Catholic high school educated female who works part-time for an insurance agency. Mrs. Galioto describes her marriage as a happy one, free of family problems, difficult adjustment problems or threats of separation. This is the first marriage for both.

*Children*—None.

*Home Situation*—The patient lives with his wife in a one family house which they own. Financial status is stable.

#### MEDICAL HISTORY

Unremarkable. There is no history of an illness with prolonged fever, convulsions, fainting spells or migraine headaches. The patient is not accident prone and has never received a head injury which rendered him unconscious. Furthermore, there is no history of tuberculosis, venereal disease, kidney ailment, cardiac disturbance, stomach or digestive disturbance, diabetes, allergies or surgery. The patient smokes cigarettes and drinks in a social situation. Recently he has been using Valium.

#### PRE-ILLNESS PERSONALITY

By nature the patient is strong willed, perfectionistic, tense, worrisome and overly sensitive. He is both independent and self-confident, stubborn but not bossy.

Although not demonstrative in his affection the patient is warm, funloving, friendly, sociable and tactful. He manages money well and is neat about both himself and his belongings. In the past the patient has enjoyed hunting and building. Sexual attitudes and habits were normal.

#### PSYCHIATRIC HISTORY AND PRESENT ILLNESS

Two years ago, after taking a course in sensitivity training, the patient became confused and upset. Although disenchanted with the course the patient compulsively collected circulars and pamphlets about the subject. Following this course in sensitivity training, there became apparent a change in temperament. Although he still functioned on a satisfactory level, the patient's behavior was compulsive in nature and speech was at times illogical. He began discussing God, at times stating that he was God and at other times emphatically stating that he was not.

At the present time the patient is not acutely psychotic or suicidal, and he is considered not dangerous to himself or others. The patient has been able to gain some insight into his condition and has not expressed any paranoid delusions or bizarre behavior during the last two weeks of his hospitalization. It is felt that he has received the maximum benefit from his present hospitalization, and he is discharged on June 4, 1971.

After his discharge from the hospital the patient will continue on Prolixin 2.5 mgs. t.i.d. and Artane 5 mgs. b.i.d. Prescriptions to cover these medications for a period of 20 days were given to his wife. The patient and his wife were also advised to make arrangements through their family physician, Dr. Albano, for Mr. Galioto to continue on outpatient psychiatric care starting the week after his discharge from the hospital.

#### FINAL DIAGNOSIS

Acute schizophrenic episode (295.4), with strong paranoid features. Condition on discharge improved.

R. G. ALVAREZ, M.D./mbc

R. G. ALVAREZ, M.D.  
280 HOBART STREET  
PERTH AMBOY, NEW JERSEY 08861

Telephone 826-3064

February 19, 1981

Dante J. Mercurio  
P.O. Box 1471  
316 Broad Street  
Bloomfield, NJ 07003

Re: Anthony J. Galioto

Dear Mr. Mercurio,

This is to certify that Mr. Galioto has been under my care for the last eleven years. He has been doing especially well during the past five years with no episodes of psychotic behavior having occurred. Based on his past psychiatric history, I do not find any evidence that he would use a firearm in an unlawful manner. Mr. Galioto has never displayed any destructive tendencies either towards himself or others. If further information is required, please feel free to contact me.

/s/ R. G. ALVAREZ, M.D.  
R. G. Alvarez, M.D.

Application for gun permit & Firearms Purchaser ID card  
on behalf of ANTHONY J. GALIOTO.

To: Superior Court of New Jersey, Law Division, Essex  
County

#### CERTIFICATION

I hereby certify that the following statements made by me are true:

1. I incorporate herein the contents of my letter of February 19, 1981, directed to Mr. Dante J. Mercurio.

2. The contents of N.J.S. 2c:58-3 (c)(3) have been brought to my specific attention. There is no doubt in my mind that Mr. Galioto "is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms."

3. There is no doubt in my mind that he would handle all types of permitted firearms in a lawful manner.

4. Any representation made to the court by anyone else which would—directly or indirectly—indicate that my statements herein are not true are false and without substance.

Dated: 10 March 81

/s/ R. G. ALVAREZ, M.D.

Dated: 6/4/82

/s/ R. G. ALVAREZ, M.D.

SUPERIOR COURT OF NEW JERSEY  
ESSEX COUNTY — LAW DIVISION

Application of  
ANTHONY J. GALIOTO, APPELLANT

O R D E R

The application for a firearms purchaser identification card having been previously denied by the Chief of Police of the Town of West Orange, New Jersey,

and the appellant having requested a hearing pursuant to 2C:58-3(b); and the matter coming on to be heard on Monday, April 27, 1981

it is on this 27th day of April, 1981 —

ORDERED that the application for a firearms purchaser identification card be and the same is hereby GRANTED.

/s/ EDWARD F. NEAGLE, JR.  
Edward F. Neagle, Jr.  
J. S. C.



FIREARMS TRANSACTION RECORD  
PART I - INTERSTATE OVER-THE-COUNTER

SECTION A - MUST BE COMPLETED PERSONALLY BY TRANSFEREE (SEE INSTRUCTIONS ON REVERSE)

4. EMPLOYEE'S NAME (Last, First, Middle)

Gillette, Arthur 4

RESIDENCE ADDRESS (No., Street, City, State, Zip code)

Dr. D. 2  
17  
17051

2 HEIGHT	3 WEIGHT	4 RACE
5'-10"	170 =	C
6 DATE OF BIRTH	7 PLACE OF BIRTH	

6. DATE OF BIRTH

127511

7. PLACE OF BIRTH  
Hickory, N.C.  
L-1

4. Are you under indictment or information\* in any court for a crime punishable by imprisonment for a term exceeding one year? \*A formal accusation of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury

2

c. Are you a fugitive from justice?

d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug?

e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?

1. Have you been discharged from the Armed Forces under dishonorable conditions?

g. Are you an alien illegally in the United States?

h. All you + ~~prisoner~~ who, having been a citizen of the U.S. + ~~prisoner~~, has renounced his citizenship?

120

I hereby certify that the answers to the above are true and correct. I understand that a person who answers "Yes" to any of the above questions is prohibited from possessing and/or possessing a firearm, except as otherwise provided by Federal law. I also understand that the making of any false or fictitious statement or the furnishing of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

7.2.1.5. SECRET'S SIGNATURE

DATE

10/22/82

SECTION B - TO BE COMPLETED BY TRANSFEROR (SELLER) (SEE INSTRUCTIONS ON REVERSE.)

VEHICLE DESCRIBED IN SECTION A

☐ IS KNOWN TO ME  
☒ HAS IDENTIFIED

3. HAS IDENTIFIED HIMSELF TO ME IN THE FOLLOWING MANNER

## 16. Multiple Choice Question

THE UNIVERSITY OF CHICAGO PRESS

1950

12-1-1941

二、三、四、五、六

THE NATIONAL ARCHIVES (1000 IMPERIAL STREET)

GENERAL FIELD OFFICERS

FLY'S SPORT SHIRTS

559 HIGHWAY 22

FILED

100

1182-1687V

DEPARTMENT OF THE TREASURY  
Bureau of Alcohol, Tobacco and Firearms  
APPLICATION FOR RELIEF FROM DISABILITIES  
(Complete in Triplicate)

1. NAME (1) (Last, First, Middle)  
**GALOTO, Anthony Joseph**

The following information is provided pursuant to section 3 of the Privacy Act of 1974 (5 U.S.C. § 522(e) (3)).  
Authority: Solicitation of this information is made pursuant to 18 U.S.C. Chapters 40 and 44. Disclosure of this information by the applicant is mandatory if the applicant wishes to seek relief from Federal firearms or explosives disabilities. §§925(c) and 845(b), and Purpose: To determine whether the applicant is eligible to apply for relief from disabilities under 18 U.S.C. §§925(c) and 845(b), and to determine whether the relief should be granted.

Routine Use: The information will be used by ATF to make the determinations set forth in paragraph 2. In addition, the information may be disclosed to other Federal, State, foreign, and local law enforcement and regulatory agency personnel to verify information on the application and to aid in the performance of their duties with respect to the regulation of firearms, ammunition, and explosives. The information may further be disclosed to the Justice Department if it appears that the furnishing of false information may constitute a violation of Federal Law.

Effects of not Supplying the Information Requested: Failure to supply complete information will delay processing and may cause denial of the application.

The following information is provided pursuant to section 7(b) of the Privacy Act of 1974.

Disclosure of the individual's social security number is voluntary. Solicitation of this information is made pursuant to 18 U.S.C. §§925(c) and 845(b), and may be used to verify the identity of the applicant.

APPLICATION IS HEREBY MADE FOR RELIEF FROM DISABILITIES (Check appropriate box).

☐ Under Chapter 40, Title 18, U.S.C. (Explosives), for a crime punishable by imprisonment for a term exceeding one year or an indictment with respect thereto.  
☒ **OTHER** ☐ Under Chapter 44, Title 18, U.S.C. (Firearms), for a crime punishable by imprisonment for a term exceeding one year.

2. BIRTHPLACE (23) (City & State) <b>Bloomfield NJ</b>	3. DATE OF BIRTH (7) <b>19 NOV 27</b>	4. ALIASES (19) <b>NONE</b>	5. SOCIAL SECURITY NUMBER (12) <b>136-24-1828</b>
6. PRESENT ADDRESS (8) (No., Street, City, State, Zip Code) <b>22 Westwood Dr N, West Orange NJ 07052</b>		7. TELEPHONE NUMBER (44) <b>201-654-7434 (off) 201-731-7138 (ho)</b>	

8. LENGTH OF RESIDENCE AT PRESENT ADDRESS (month and year) <b>C-M</b>	9. DESCRIPTION RACE/SEX (2) <b>C-M</b>	HEIGHT (3) <b>5'10"</b>	WEIGHT (4) <b>170 lbs</b>	HAIR (5) <b>Auburn</b>	EYES (6) <b>Brown</b>
10. RESIDENCES DURING PAST TEN YEARS (In columns (b) and (c) enter the month and year of residence)					
ADDRESS (Number, Street, City, State, Zip Code) (a)		FROM (b)	TO (c)		

**22 Westwood Dr N, West Orange NJ 07052** **Jan 59 Present**

11. EMPLOYMENT RECORD (List present and immediate prior employers and show month and year of employment)

NAME AND ADDRESS OF EMPLOYER	POSITION (b)	FROM (c)	TO (d)
<b>Part Authority NY &amp; NJ</b>	<b>NY 10048</b>		
<b>USAF - Mitchell AFB - Long Island NY</b>	<b>Engineer</b>	<b>Jun 53</b>	<b>Present</b>

12. CONVICTIONS (If pardoned for a conviction, write "Yes" in column (e) and attach a copy of the pardon.)

SPECIFIC CRIME (a)	NAME AND LOCATION OF COURT (b)	SENTENCE RECEIVED (b)	CONVICTION DATE (c)	PARDONED (d)
<b>NONE</b>				

13. OTHER ARRESTS

CHARGE (a)	DATE AND PLACE OF ARREST (b)	DISPOSITION (c)
<b>NONE</b>		

14. PROBATION OFFICER'S NAME, ADDRESS AND TELEPHONE NO. 15. PAROLE OFFICER'S NAME, ADDRESS AND TELEPHONE NO.



16. CHARACTER REFERENCES (Three required)		NAME AND ADDRESS (a)		OCCUPATION (b)	TELEPHONE NUMBER (c)
		Michael Mercurio 74 Malvern Rd		Clark US Pharmacist	201-381-4534
		Roger Murray 2500 Park Av Baldwin NY		Engineer	201-659-7947 516-223-2619
		Walter Giordano 16 Mackburne Ter US 07052		Welder Painter	406-440-1450 201-734-1550

  

17. APPLICANT DATA (All questions must be answered by a "Yes" or "No")			
(a) ARE YOU A FUGITIVE FROM JUSTICE?	YES	NO	(i) HAVE YOU SERVED ON ACTIVE DUTY IN THE ARMED FORCES? (If "Yes" check branch and complete following)
		X	ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINES <input checked="" type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD
(b) ARE YOU AN UNLAWFUL USER OF OR ADDICTED TO MARIJUANA, ANY DEPRESSANT OR STIMULATING DRUG, OR ANY NARCOTIC DRUG?		X	
(c) HAVE YOU EVER RENOUNCED YOUR UNITED STATES CITIZENSHIP?		X	SERVICE SERIAL NUMBER 05A 41247264 USAF. AO 2217966
(d) ARE YOU AN ALIEN ILLEGALLY IN THE UNITED STATES?		X	KIND OF DISCHARGE Honorable
(e) HAVE YOU EVER BEEN ADJUDICATED AS A MENTAL DEFECTIVE?		X	(k) ARE YOU NOW UNDER INDICTMENT OR INFORMATION IN ANY COURT FOR A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR? (If "Yes" show date, court, charges and current status.)
(f) HAVE YOU EVER BEEN COMMITTED TO A MENTAL INSTITUTION?		X	
(g) HAVE YOU EVER BEEN ADJUDGED BY A COURT OF BEING MENTALLY INCOMPETENT?		X	(l) HAVE YOU EVER APPLIED FOR FEDERAL FIREARMS LICENSE OR A FEDERAL EXPLOSIVES LICENSE OR PERMIT? (If "Yes" show date and with whom filed.)
(h) ARE YOU NOW ON PROBATION OR PAROLE?		X	
(i) HAVE YOU EVER BEEN DISCHARGED FROM THE ARMED FORCES UNDER DISHONORABLE CONDITIONS?		X	

  

18. Complete This Item Only If Applicant Was Ever Issued A Federal Firearms License Or A Federal Explosives License Or Permit.	
BUSINESS NAME AND ADDRESS (LICENSE/PERMIT ISSUED UNDER)	LICENSE OR PERMIT NO. EXPIRATION DATE OF LATEST LICENSE OR PERMIT

  

19. I BELIEVE I SHOULD BE GRANTED RELIEF BECAUSE:	
<p>THE BUSINESS IS (Check one) <input type="checkbox"/> INDIVIDUALLY OWNED <input type="checkbox"/> A PARTNERSHIP <input type="checkbox"/> A CORPORATION <input type="checkbox"/> OTHER (Specify)</p> <p>The State of NJ has issued a Firearms Purchase ID 899649A          a permit to purchase a handgun Control No. 01759.          My doctor has furnished the attached certification regarding my competency.          Copies attached</p>	

  

20. IMPORTANT. Applicants Filing For Relief From Disabilities Under Chapter 44, Title 18, U.S.C. (Firearms) Must Complete This Item.	
<p>No application for relief under Chapter 44, Title 18, U.S.C. will be considered unless the applicant acknowledges and agrees that a notice of approval will appear in the Federal Register, an official U.S. Government publication available to the general public, if and when the application is approved. The notice of approval will give all essential details including the applicant's name, address, the court and date of conviction.</p> <p><input checked="" type="checkbox"/> IF THE EVENT THIS APPLICATION IS APPROVED:          I understand that a notice of approval will appear in the Federal Register immediately following the issuance of the approval, and</p> <p><input type="checkbox"/> I hereby agree to publication of the notice of approval giving my name, address, and the date of my conviction.</p>	

  

21. SIGNATURE OF APPLICANT		22. DATE
Walter J. Giordano		3 Nov 82

NOTE: A COMPLETED FD 258 (FINGERPRINT IDENTIFICATION CARD) MUST ACCOMPANY THIS APPLICATION



DEPARTMENT OF THE TREASURY  
Bureau of Alcohol, Tobacco and Firearms  
Washington, D.C. 20226

June 23, 1983

CC-32,304 RMT

Dante J. Mercurio, Esq.  
P.O. Box 1471  
Bloomfield, NJ 07003

In re: Federal Firearms Disability of  
Mr. Anthony J. Galioto

Dear Mr. Mercurio:

This is in reference to your letter to the Chief Counsel, inquiring as to the status of the application for relief from Federal firearms disability submitted by your client, Mr. Galioto. Parenthetically, we note that while no formal letters have been mailed to your client regarding his application, Bureau personnel have discussed by telephone the matter with him at various times.

Prior to discussing the firearms disabilities arising from adjudications relating to mental competence, we note that under 18 U.S.C. § 925(c), the Bureau is only authorized to grant relief from the firearm disabilities arising from criminal convictions. Therefore, if Mr. Galioto is determined to be disabled because of an adjudication relating to his mental competence, the Bureau is not authorized to grant relief under section 925(c). However, the Bureau can assist Mr. Galioto in determining whether he is, in fact, under such firearms disabilities.

Under Title I of the Gun Control Act of 1968, 18 U.S.C. Chapter 44, no person who has been adjudicated as a mental defective or who has been committed to a mental institution may ship or transport any firearm or ammunition

in interstate or foreign commerce. Additionally, under Title VII of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. App. § 1201, *et seq.*, no person who has been adjudicated of being mentally incompetent may receive, possess, or transport in commerce, or affecting commerce, any firearm. Under the Federal firearms law, there must be some adjudication or formal commitment before the firearms disabilities arise. Thus, a voluntary admission to a mental hospital does not result in Federal firearms disabilities.

As you can see from the above, it is necessary to determine the nature of your client's commitment. As we understand, your client was voluntarily admitted to the Fair Oaks Hospital in May 1971, but was subsequently "regularly committed" to that institution. The information provided by Mr. Galioto does not explain the procedure resulting in his regular commitment. In order to expedite a determination in your client's case, it would be of considerable assistance if you would provide the Bureau with copies of the documents resulting in your client's regular commitment. The material submitted by Mr. Galioto relating to his New Jersey firearms purchaser identification card and the hospital report does not disclose this information. Thus, before furnishing advice, we must be advised of the procedures governing and documents constituting the order of regular commitment.

We trust this letter is responsive to your inquiry and await your reply regarding the requested information.

Sincerely yours,  
STEPHEN E. HIGGINS  
Director

April 13, 1984

Mr. Dante J. Mercurio  
Attorney at Law  
316 Broad Street  
P.O. Box 1471  
Bloomfield, New Jersey 07003

Re: Anthony J. Galioto

Dear Mr. Mercurio:

This is in reference to your request for a determination as to Mr. Galioto's status under the Federal firearms laws because of his commitment to a mental institution.

We have reviewed the documents you forwarded us regarding Mr. Galioto's commitment. Mr. Galioto was formally committed to a mental institution based on a judicial finding of mental illness and was discharged on a determination other than a finding that he was competent in accordance with the laws of the State in which he was committed. Therefore, it is our opinion that Mr. Galioto is subject to Federal firearms disabilities because of his commitment.

Sincerely yours,  
STEPHEN E. HIGGINS  
Director

TVFaulkner: dg 11/21/83

**In the Supreme Court of the United States**

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No. 84-1904

---

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU  
OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT

v.

ANTHONY J. GALIOTO

---

APPEAL from the United States District Court for the  
District of New Jersey,

The statement of jurisdiction in this case having been  
submitted and considered by the Court, probable jurisdiction  
is noted.

NOVEMBER 4, 1985

# **APPELLANT'S BRIEF**



6  
No. 84-1904

Supreme Court, U.S.

FILED

JAN 2 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU  
OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT

v.

ANTHONY J. GALIOTO

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

---

**BRIEF FOR THE APPELLANT**

---

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## QUESTIONS PRESENTED

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, prohibits several categories of persons, including felons and individuals who have been committed to mental institutions, from receiving, transporting or shipping firearms in interstate commerce. Title IV also empowers the Secretary of the Treasury to grant relief from these disabilities to certain felons. The questions in this case are:

1. Whether Title IV violates the equal protection and due process components of the Fifth Amendment by imposing firearms disabilities on persons who have been committed to mental institutions without making administrative relief from those disabilities available to such persons.

2. If so, whether the district court erred in remedying the constitutional violation by invalidating all of Title IV's restrictions on the acquisition of firearms by persons who have been committed to mental institutions, rather than by either expanding or nullifying only the administrative relief provision.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 84-1904

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU  
OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT

v.

ANTHONY J. GALIOTO

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY*

---

**BRIEF FOR THE APPELLANT**

---

**OPINION BELOW**

The opinion and order of the district court (J.S. App. 1a-22a) are reported at 602 F. Supp. 682.

**JURISDICTION**

The judgment of the district court (J.S. App. 23a) was entered on February 7, 1985. A notice of appeal (J.S. App. 24a) was filed on March 7, 1985. On April 25, 1985, Justice Brennan extended the time for docketing the appeal through June 5, 1985; the jurisdictional statement was filed on that date. The Court noted probable jurisdiction on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED**

The relevant constitutional and statutory provisions are set forth at, App., *infra*, 1a-4a.



## STATEMENT

1. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 (Title IV), as amended by the Gun Control Act of 1968 (Gun Control Act), 18 U.S.C. 921 *et seq.*, prohibits any individual who "has been adjudicated as a mental defective or who has been committed to any mental institution" from receiving, transporting or shipping a firearm or ammunition in interstate commerce (18 U.S.C. 922(g)(4) and (h)(4)), and makes it unlawful for a federal firearms licensee knowingly to sell a gun to such a person. 18 U.S.C. 922(d)(4). Title IV also imposes identical disabilities on several other categories of persons, including those who have been convicted of a felony.<sup>1</sup> Similarly, the partially overlapping provisions of Title VII of the Gun Control Act (Title VII), 18 U.S.C. App. 1201 *et seq.*, prohibit several categories of persons—including felons and persons who "ha[ve] been adjudged by a court \* \* \* of being mentally incompetent" (18 U.S.C. App. 1202(a)(1) and (3))—from lawfully receiving, possessing or transporting firearms.<sup>2</sup>

<sup>1</sup> The other enumerated categories are fugitives from justice (18 U.S.C. 922(d)(2), (g)(2) and (h)(2)) and persons who are users of, or addicted to, certain drugs. 18 U.S.C. 922(d)(3), (g)(3) and (h)(3). Title IV's felony disability attaches to any person convicted of a "crime punishable by imprisonment for a term exceeding one year." The disability does not apply, however, to individuals convicted of antitrust and related trade regulation offenses or of certain crimes classified as misdemeanors under state law. 18 U.S.C. 921(a)(20).

<sup>2</sup> Also subject to disabilities under Title VII are convicted felons (18 U.S.C. App. 1202(a)(1)); persons who have been discharged from the armed forces under dishonorable conditions (18 U.S.C. App. 1202(a)(2)); persons who have renounced United States citizenship (18 U.S.C. App. 1202(a)(4)); and aliens illegally present in the United States. 18 U.S.C. App. 1202(a)(5).

Title IV also, in limited circumstances, empowers the Secretary of the Treasury (and through him his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF)) to lift the disabilities imposed by Titles IV and VII on certain convicted felons. Under 18 U.S.C. 925(c), a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year may apply to the Secretary for administrative relief; the Secretary may grant the application if he is satisfied "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* Such relief is not available, however, to felons convicted of crimes "involving the use of a firearm or other weapon or a violation of [18 U.S.C. 921-928] or of the National Firearms Act." *Ibid.*

2. On May 11, 1971, appellee "suffered an acute mental breakdown" (J.S. App. 3a) and voluntarily entered a mental hospital in Summit, New Jersey.<sup>3</sup> He was diagnosed as having experienced "an acute schizophrenic episode with paranoid features" (*ibid.*). Shortly after his admission to the hospital appellee "became extremely violent, resistive and unable to control his emotions" (J.A. 8); when appellee expressed his intention to leave the hospital within 72 hours, he was committed upon the application of his

<sup>3</sup> During the two-year period prior to his commitment, appellee's behavior, while "satisfactory," was "compulsive in nature and [his] speech was at times illogical. He began discussing God, at times stating that he was God and at other times emphatically stating that he was not" (J.A. 11). During the week prior to his admission to the hospital appellee "became extremely psychotic, delusional and assaultive at home, destroying part of the house when he could not control his anxiety and became overwhelmed by his delusions" (*id.* at 8; see *id.* at 5-6).

physician (J.S. App. 3a).<sup>4</sup> Appellee was discharged from the hospital on June 4, 1971, upon a finding that his condition had improved (*ibid.*). At that time he was given a course of antipsychotic drugs and advised to continue outpatient psychiatric care (J.A. 11).

Almost 10 years later, on April 27, 1981, appellee obtained a firearms purchaser identification card pursuant to New Jersey law.<sup>5</sup> In October 1982, however, a federally-licensed firearms dealer refused to sell appellee a gun after appellee acknowledged that he once had been committed to a mental institution (Pet. App. 4a). Citing 18 U.S.C. 925(c), appellee then applied to BATF, seeking relief from the disability that followed from his commitment. He included a statement from his physician certifying that he "was no longer suffering from any mental disability that would interfere with his handling of firearms" (J.S. App. 4a). On April 13, 1984, BATF denied appellee's application, explaining that he remained " 'subject to Federal firearms disability because of his commitment' " (*id.* at 5a).

3. Appellee then brought this suit in the United States District Court for the District of New Jersey, arguing that the disability provisions of the federal firearms laws are unconstitutional because they make administrative relief

<sup>4</sup> Appellee's commitment required a judicial finding that there "exist[ed] in the patient a diagnosed mental illness of such degree and character that the person, if discharged, [would] probably imperil life, person or property." N.J. Stat. Ann. § 30:4-48 (West 1981).

<sup>5</sup> Such a card, which in New Jersey must be obtained prior to the purchase of a firearm, may not be issued to a person "who has ever been confined for a mental disorder \* \* \* unless \* \* \* [he] produces a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms." N.J. Stat. Ann. § 2C:58-3(c)(3) (West Supp. 1985).

available to felons but not to persons who have been committed to mental institutions. The court accepted this contention, invalidating as inconsistent with the Fifth Amendment's equal protection and due process guarantees the provisions of Title IV that deny persons who have been committed the opportunity to obtain firearms.<sup>6</sup>

The district court began its equal protection analysis by concluding that "persons with histories of mental illness are a quasi-suspect class deserving of intensified 'intermediate' scrutiny," so that "any statute treating them differentially must be related to a 'substantial' governmental interest" (J.S. App. 9a). After reaching this conclusion, however, the court expressly declined to rest its holding on the application of such a test (*id.* at 12a), finding instead that the challenged provisions of the Gun Control Act are wholly irrational.

In making this determination, the district court first opined that of all the persons affected by the federal firearms laws, "only ex-convicts and former psychiatric patients are classed according to a *past* occurrence in their lives" (J.S. App. 15a (emphasis in original)). And because Section 925(c) permits convicted felons to overcome the statutory disabilities, the court concluded, "out of all the categories of individuals disabled from purchasing firearms, only the former mental patients are permanently disabled on the basis of a past event \* \* \* with no opportunity to establish that, in fact, they are now capable of safe handling" (J.S. App. 15a-16a (footnote omitted)).

The district court then found that this distinction between felons and former mental patients is irrational, explaining that "if anything, the bar would be more logically

<sup>6</sup> Although appellee's complaint noted that he was subject to disabilities under Title VII as well as under Title IV, the district court's opinion does not discuss Title VII and the court's order does not invalidate Title VII's disability provisions. The court did not explain the reason for this omission.



applied to convicts than to former mental patients, rather than vice versa" (J.S. App. 16a). Several factors contributed to this conclusion: "the bar has a punitive aspect" (*ibid.*); felons have demonstrated that they are capable of criminal activity; and a patient is unlikely to appeal his commitment after he is discharged, "so the propriety of the initial commitment may never be fully explored" (*id.* at 17a). The court also noted that commitment proceedings have fewer procedural protections than do criminal trials, adding that appellee had cited studies showing that such proceedings "are replete with erroneous factual findings" (*ibid.*). The court therefore found that the distinction drawn by the federal firearms laws between felons and mental patients must have been based upon outdated notions that "ignore[ ] expanding knowledge about the causes of mental illnesses, their reversibility and treatment" (*id.* at 18a).

The district court also added an alternative holding: that the challenged provisions violate due process standards because they deny "former mental patients the opportunity to establish that they no longer present the danger against which the statute was intended to guard" (J.S. App. 18a). This factor "in effect creates an irrebuttable presumption that one who has been committed, no matter [what] the circumstances, is forever mentally ill and dangerous" (*ibid.*). The court found the use of such a presumption irrational because, "without any good faith extrinsic justification \* \* \* it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed" (*id.* at 19a).

The district court acknowledged that statutes generally prohibiting former mental patients from purchasing firearms are not irrational (J.S. App. 21a) and that such regulations serve "a legitimate, indeed substantial, state

objective" (*id.* at 18a). But the court held that such prohibitions are both irrational and unconstitutional if they do "not include some provision for the granting of relief from disability to former mental patients in appropriate cases" (*id.* at 21a). Because the court believed that it lacked the competence to make administrative relief available to appellee, it simply declared unconstitutional "those provisions of 18 U.S.C. § 921 *et seq.* which have been used to deprive [appellee] of his ability to purchase a firearm" (*ibid.*).

#### SUMMARY OF ARGUMENT

A. 1. The district court's invalidation of the challenged provisions of Title IV was grounded on a misconception of the statutory scheme. Persons with a history of mental illness are not the only ones subjected to permanent disabilities by the firearms laws: Titles IV and VII (which were intended to complement one another) keep firearms out of the hands of several "categories of presumptively dangerous persons" (*Lewis v. United States*, 445 U.S. 55, 64 (1980)), including felons, persons who have been dishonorably discharged from the armed forces, and individuals who have renounced American citizenship. As the district court itself acknowledged, Congress's decision to include persons with a history of commitment on this list — and thus to use commitment as a trigger for Title IV's disabilities — was entirely reasonable. See *Huddleston v. United States*, 415 U.S. 814, 828 (1974).

2. In finding the challenged provisions unconstitutional, the district court accordingly focused its attention not on Title IV's basic restrictions, but rather on 18 U.S.C. 925(c), which makes administrative relief available only to certain felons. The court reasoned that Congress singled out persons with a history of commitment for uniquely unfavorable treatment when it failed to accord them administrative relief, a judgment that the court concluded must



have been based on " 'archaic and stereotypic' " notions that mental illness is always incurable (J.S. App. 17a-18a).

The district court failed to realize, however, that Congress withheld relief from virtually *all* of the categories of "presumptively dangerous persons" that are subjected to permanent disabilities by the Gun Control Act. The relief provision is a narrow one that generally excludes the felons who most clearly pose a risk of dangerous behavior—that is, those who have committed firearms offenses or crimes involving weapons. Also excluded are persons who were dishonorably discharged from the armed forces or who renounced American citizenship. And the legislative history confirms that Section 925(c) was intended to function as a modest departure from the otherwise absolute disabilities imposed on presumptively risky persons; its enactment was inspired by the drastic effect that the felony disability provision had on corporate firearms manufacturers, who in the absence of a relief provision would be forced out of the firearms business upon being found guilty of a felony.

In assuming that Congress chose to "single out" those with a history of commitment for unfavorable treatment, the court below thus misunderstood the history of Section 925(c). Congress's decision to withhold relief from such individuals, as well as from most other persons in presumptively risky categories, reflects its judgment that broad prophylactic rules are the most effective way to protect the public, rather than a conclusion that "mental illness is always, in every instance, permanent and incurable" (J.S. App. 18a). That Congress chose to modify the felony disability provision to remedy a perceived defect did not obligate it to modify the other disability rules as well: "[A] legislature 'may implement [its] program step by step, \* \* \* adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" *Minnesota v. Clover Leaf*

*Creamery Co.*, 449 U.S. 456, 466 (1981) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

3. Even considered in isolation from its history, there was nothing irrational in Congress's decision to make relief available to the presumptively less dangerous category of felons whose crimes did not involve the use of a weapon, while failing to create a parallel administrative mechanism that would attempt to identify and provide relief to non-dangerous persons with a history of commitment. Its decision to withhold relief from the latter category of persons plainly was based on the congressional belief that, whatever the nature of any "subsequent curative events," individuals who have been committed, "though unfortunate, [are] too much of a risk to be allowed firearms privileges." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983). That risk undoubtedly is a real one. Commitment may be ordered only in the presence of clear and convincing evidence that the individual involved presents a danger to himself or others. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). And once such a showing of serious mental illness has been made, subsequent predictions about future dangerousness cannot be stated with confidence. See *id.* at 584 (Burger, C.J., concurring); *Estelle v. Smith*, 451 U.S. 454, 472 (1981).

Against this background, Congress was under no obligation to base its legislative efforts on the district court's assessment of the "expanding" body of knowledge relating to the causes and treatment of mental illness (J.S. App. 18a). It is enough that Congress reasonably believed that persons with a history of commitment pose special risks. See *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979). Indeed, the relatively uncertain and evolving nature of psychiatry *itself* makes expansive restrictions on the acquisition of firearms by those with a history of commitment necessary to fulfill the broad prophylactic purpose of Title IV. Congress's determination not to impose equally

absolute restrictions on a limited category of felons—who do not share the psychological characteristics of the mentally ill, and who may be better able than those with a history of commitment voluntarily to conform their conduct to the law's requirements—does not make the legislative scheme as a whole irrational.

B. The conclusion that Congress acted rationally in enacting Title IV should end the equal protection inquiry, for the district court plainly erred in concluding that “former mental patients” are a “‘quasi-suspect class’” who must be protected by “‘intermediate’ scrutiny” (J.S. App. 10a). This Court repeatedly has explained that “what differentiates [suspect classes] from \* \* \* nonsuspect statuses \* \* \* is that [a suspect] characteristic frequently bears no relation to ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (footnote omitted) (plurality opinion). See *City of Cleburne v. Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 6, 8. Yet many of the mentally ill undoubtedly “do have reduced ability for personal relations, for economic activity, and for political choice” (*Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979)), and the uncertain nature of psychiatric judgments suggests that at least some persons with a history of commitment either share these characteristics or will again exhibit symptoms of mental illness in the future. There accordingly is no reason for the courts to presume that restrictions such as those found in Title IV were inspired by an unreasoning antipathy towards the mentally ill. Similarly, the other considerations set out in this Court’s equal protection decisions—the affirmative nature of the legislative response to the problems of the class at issue, the amorphousness of that class, and the responsiveness of the political process to the needs of the mentally ill—also militate against the application of intermediate scrutiny here.

C. There is one final flaw in the district court’s equal protection analysis: even if its constitutional holding was

correct, it erred in its choice of remedy. The equal protection violation here (if one exists) is the denial of equal treatment to appellee that is embodied in Section 925(c)’s provision of administrative relief to certain felons but not to persons with a history of commitment. Upon finding a violation of this sort, the court should have either declared Section 925(c) a nullity or extended that provision’s limited benefits to appellee’s class. See *Heckler v. Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 9-10; *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979). In choosing instead to invalidate all of Title IV’s underlying restrictions on the acquisition of firearms by persons who have been committed to a mental institution—a ruling that makes it lawful even for the demonstrably insane to purchase a gun—the court below exceeded its “constitutional competence” (*id.* at 91), while failing to “accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole” (*id.* at 94 (opinion of Powell, J.)).

D. The district court’s alternative holding, which turned on its conclusion that the challenged provisions of Title IV create a constitutionally infirm “irrebuttable presumption,” also is flawed. A legislative classification satisfies due process standards if Congress reasonably could have concluded “that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.” *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975). Here, given the “fallibility of medical and psychiatric diagnosis” (*Parham v. J.R.*, 442 U.S. 584, 609 (1979)), it hardly was unreasonable for Congress to have concluded that an individual who once was committed may pose a greater than usual risk of becoming a threat to society. And where any error in prediction may have catastrophic consequences, “generalized rules” plainly “are appropriate to [Congress’s] purpose and concerns.” *Salfi*, 422 U.S. at 785.



### ARGUMENT

#### CONGRESS ACTED CONSTITUTIONALLY IN PROHIBITING PERSONS WITH A PROVEN HISTORY OF MENTAL ILLNESS FROM OBTAINING FIREARMS

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted as a central portion of the congressional effort to curb the "real, \* \* \* urgent and \* \* \* increasing" problem of firearms abuse. S. Rep. 1097, 90th Cong., 2d Sess. 78 (1968). Congress recognized that easy access to firearms by persons likely to misuse them posed a significant threat to public safety. See *id.* at 28; S. Rep. 1501, 90th Cong., 2d Sess. 22 (1968). It therefore created general prophylactic rules designed "broadly to keep firearms away from \* \* \* persons \* \* \* classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218 (1976).

The district court invalidated one of those prophylactic rules because it believed that the congressional scheme is insufficiently precise. But in reaching this conclusion—and by issuing a judgment that permits even demonstrably incompetent or insane individuals to obtain guns—the district court failed to recognize that it is the very breadth of Title IV's proscriptions that make the statute effective as a means of "keep[ing] firearms out of the hands of those not legally entitled to possess them." S. Rep. 1501, *supra*, at 22. The decision below thus cannot be squared with the repeated holdings of this Court that have "recognized and given weight to the [Gun Control] Act's broad prophylactic purpose." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983).

#### A. Congress Acted Rationally In Imposing Permanent Firearms Disabilities On Persons With A Proven History Of Mental Illness

1. At the outset, the district court's holding that the challenged provisions of Title IV lack a rational basis was grounded on a misconception of the statutory scheme.

Despite the court's suggestion to the contrary, persons with a history of commitment<sup>7</sup> are not the only ones subjected to permanent disabilities by the firearms laws. Instead, Title IV presents "a carefully constructed package of gun control legislation" (*Scarborough v. United States*, 431 U.S. 563, 570 (1977)) that, in combination with Title VII,<sup>8</sup> is designed to keep firearms out of the hands of several "categories of presumptively dangerous persons." *Lewis v. United States*, 445 U.S. 55, 64 (1980). See *New Banner*, 460 U.S. at 112 n.6, 119. In addition to individuals with a history of commitment, these provisions impose lifetime firearms disabilities on felons (18 U.S.C. 922(d)(1), (g)(1) and (h)(1), and 18 U.S.C. App. 1202(a)(1)), persons who are discharged from the armed forces under dishonorable circumstances (18 U.S.C. App. 1202(a)(2)), and individuals who renounce American citizenship (18 U.S.C. App. 1202(a)(4))—groups linked to one another by the congressional judgment that each contains significant numbers of "especially risky people." *United States v. Bass*, 404 U.S. 336, 345 (1971).

As the district court itself acknowledged (J.S. App. 21a), the inclusion on this list of persons with a history of commitment is eminently reasonable. It seems plain that "[n]o one can dispute the need to prevent \* \* \* mental incompetents \* \* \* from buying, owning, or possessing firearms." *Huddleston v. United States*, 415 U.S. 814, 828 (1974), (quoting 114 Cong. Rec. 21784 (1968) (remarks of Rep. Celler)). And a "legislative determina-

<sup>7</sup> For convenience, the phrase "persons with a history of commitment" will be used to refer to all of the categories of persons described in 18 U.S.C. 922(d)(4), (g)(4) and (h)(4), and 18 U.S.C. App. 1202(a)(3)—that is, persons who have been "adjudicated as a mental defective," "committed to a mental institution," or "adjudged \* \* \* mentally incompetent."

<sup>8</sup> Title VII was intended to "complement" Title IV (*United States v. Bass*, 404 U.S. 336, 342 (1971)); the Court accordingly has "treated Titles VII and IV as *in pari materia*." *New Banner*, 460 U.S. at 117. See generally *United States v. Batchelder*, 442 U.S. 114, 120 (1979).



tion that, in essence, predicts a potential for future criminal behavior" is, in any event, entitled to substantial deference. *Lewis*, 445 U.S. at 67 n.9. See *United States v. Meldish*, 722 F.2d 26, 28 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984). Given this Court's judgment that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach" (*Addington v. Texas*, 441 U.S. 418, 430 (1979)), a history of commitment thus serves as a reasonable trigger for Title IV's restrictions. Cf. *Lewis*, 445 U.S. at 66 ("Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm"); *New Banner*, 460 U.S. at 120.

2. a. In finding the challenged provisions irrational, the district court accordingly focused its attention not on Title IV's basic restrictions, but rather on 18 U.S.C. 925(c), which makes administrative relief from the lifetime disabilities available only to certain felons. The court reasoned that Congress in the Gun Control Act "singl[ed] out mental patients" (J.S. App. 16a) by failing to accord them administrative relief, and thus must have based its legislation on "'archaic and stereotypic notions' \* \* \* that mental illness is always, in every instance, permanent and incurable" (*id.* at 17a-18a (citation omitted)). Again, however, the district court's conclusion followed from a misunderstanding of the statute.

In fact, Congress withheld administrative relief from virtually all of the categories of "especially risky people" that are subjected to permanent disabilities by the Gun Control Act. Section 925(c) does not grant *all* felons rights that are withheld from former mental patients: the relief provision is a narrow one that generally excludes the felons who most clearly pose a risk of dangerous behavior—that is, those who have committed firearms offenses or crimes involving weapons. See *New Banner*, 460 U.S. at 117. At the same time, persons who were dishonorably discharged from the armed forces or have renounced United States citizenship also are not provided an

avenue for administrative relief.<sup>9</sup> The statutory scheme thus does not single out persons with a history of commitment for uniquely unfavorable treatment; to the contrary, it carves out a special exemption granting favorable treatment to a narrow subcategory of felons.

The legislative history confirms that Section 925(c) was intended to function as a modest departure from the otherwise absolute disabilities imposed on most categories of presumptively risky persons. The Federal Firearms Act, ch. 850, § 2(d), 52 Stat. 1251 (repealed 1968), originally prohibited all persons convicted of a "crime of violence" from receiving a firearm, but contained no relief provision. The crime of violence limitation was deleted in 1961, and the Act's disabilities extended to reach any person convicted of a federal felony. Pub. L. No. 87-342, §§ 1, 2, 75 Stat. 757. See H.R. Rep. 1202, 87th Cong., 1st Sess. 1 (1961). This amendment, however, had an unanticipated effect on the manufacturers of firearms. Such companies were forced "to cease the interstate commercial shipment of firearms" upon being found guilty of a felony, even when their crimes were wholly unrelated to their firearms operations. See S. Rep. 666, 89th Cong., 1st Sess. 2-3 (1965).

In response to this development,<sup>10</sup> an administrative relief provision—the predecessor to Section 925(c)—was

<sup>9</sup> BATF will provide administrative relief pursuant to Section 925(c) to a person whose dishonorable discharge followed from the commission of a felony, so long as the crime did not involve the use of a weapon.

<sup>10</sup> Congress was responding to the case of the Olin-Mathieson Chemical Corporation, a diversified manufacturing corporation whose operations were carried on by nine separate operating divisions. The company had pleaded guilty to conspiracy and making false statements in connection with its pharmaceuticals business. The violations "in no way related to arms or ammunition nor did [they] have any connection with Olin's [firearms] division." H.R. Rep. 708, 89th Cong., 1st Sess. 2 (1965). Under the pre-1965 law, however, Olin's guilty plea required the company to "cease the interstate commercial shipment of firearms." *Ibid.* See S. Rep. 666, *supra*, at 3.

enacted in 1965. See S. Rep. 666, *supra*, at 2-4; H.R. Rep. 708, 89th Cong., 1st Sess. 1-3 (1965). In its original form, this provision directly addressed the problem of the wayward firearms manufacturer, permitting the Secretary of the Treasury to grant relief to a felon when he believed that the applicant would "not be likely to conduct his operations in an unlawful manner." Pub. L. No. 89-184, 79 Stat. 788. The relief provision was carried over without change as Section 925(c) of Title IV. Pub. L. No. 90-351, § 902, 82 Stat. 233. See S. Rep. 1097, *supra*, at 118. When Congress amended Title IV through the enactment of the Gun Control Act of 1968 later that year, without extended discussion it substituted the current "not be likely to act in a [dangerous] manner" standard for the standard relating to the lawfulness of the applicant's conduct of his business. See 114 Cong. Rec. 27456-27457 (1968); H.R. Conf. Rep. 1956, 90th Cong., 2d Sess. 33 (1968).<sup>11</sup>

In assuming that Congress decided to "single out" those with a history of commitment for unfavorable treatment—an action that the district court imagined must evidence Congress's ignorance of the "reversibility" of some forms of mental illness (J.S. App. 18a)—the court below thus misunderstood the history of Section 925(c). Congress obviously recognized that only a relatively small number of persons in the presumptively dangerous cate-

<sup>11</sup> Indeed, the brief description of the amendment, which was offered on the Senate floor, characterized the amendment in terms quite similar to the existing relief provision; the amendment was said to give the Secretary "the power to grant an application for . . . relief if it is stated to his satisfaction that the circumstances regarding the conviction and the applicant's record and reputation are such that the applicant will not be likely to conduct his operations in an unlawful manner, and that granting of the relief sought would not be contrary to the public interest." 114 Cong. Rec. 27457 (1968) (remarks of Sen. Dodd). The primary purpose of this amendment was not to change the applicable standard, but rather to ensure that a relief provision would be applicable to the felony disabilities imposed by both Titles IV and VII. See *ibid.* (colloquy between Sen. Hruska and Sen. Dodd).

gories would misuse firearms were they able to obtain them. Cf. *United States v. Toner*, 728 F.2d 115, 129 (2d Cir. 1984). It nevertheless concluded that the difficulty of making individual determinations of future dangerousness required the use of "sweeping" prophylactic rules (*Lewis*, 445 U.S. at 63) that would operate broadly against high risk groups. See pages 13-14, *supra*. Congress's decision to withhold relief from individuals with a history of commitment therefore reflected a judgment that a broad rule was the most effective way to protect the public, rather than a conclusion that "mental illness is always, in every instance, permanent and incurable" (J.S. App. 18a).

Section 925(c)'s relief provision is not inconsistent with this scheme. It originated as a response to a narrow problem related to the felony disability provision of the firearms laws. That Congress chose to stop after remedying the defects that it perceived in the felony provision does not render its action constitutionally suspect: "[A] legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). See *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).<sup>12</sup>

<sup>12</sup> Nor is Section 925 (c) suspect because it benefits persons in addition to the firearms manufacturers whose problems inspired passage of the original administrative relief provision. "[T]he law need not be in every respect logically consistent with its aims to be constitutional." *Lee Optical*, 348 U.S. at 487-488. Congress was able to incrementally adjust the relief provision in 1968 after several years of experience with a system that permitted the Secretary to lift the disabilities imposed upon certain categories of felons; in doing so, Congress was not obligated to take the considerably more dramatic step of extending relief to entirely new categories of especially risky people.



And if Congress was not obligated to provide relief to more than one category of "especially risky people" at a time, the district court's recognition that a history of commitment is a reasonable trigger for Title IV's permanent disabilities necessarily is fatal to its holding.

b. Even considered in isolation from its history and the other disability provisions of Title IV, there was nothing irrational in Congress's decision to make relief available to the presumptively less dangerous category of felons whose crimes did not involve the use of a weapon, while failing to create a parallel administrative mechanism that would attempt to identify and provide equivalent relief to non-dangerous persons with a history of commitment. Congress obviously was aware that "a person committed to a mental institution later may be deemed cured and released." *New Banner*, 460 U.S. at 116. See 114 Cong. Rec. 21805 (1968) (remarks of Rep. Sikes). But it nevertheless chose not to accord such persons relief.<sup>13</sup> Its decision plainly was based on the congressional belief that, whatever the nature of any "subsequent curative events," individuals who have been committed, "though unfortunate, [are] too much of a risk to be allowed firearms privileges." *New Banner*, 460 U.S. at 116.

<sup>13</sup> There is no doubt that Congress intended a history of commitment to serve as a permanent bar to the acquisition of a weapon; it "made no exception for subsequent curative events." *New Banner*, 460 U.S. at 116. See *Barrett*, 423 U.S. at 217; *Scarborough*, 431 U.S. at 570. Indeed, during the debate on Title IV it was noted that the bill did not provide relief for "those who have been committed to a mental institution who have subsequently been cured and have had their rights as citizens restored to them." 114 Cong. Rec. 21805 (1968) (remarks of Rep. Sikes). Rep. Celler, the bill's floor manager, responded simply that "we incline to the view that a mental defective should not be permitted to ship, transport or receive a gun" (*ibid.*). Although opponents of the bill suggested "the draftsmanship of an amendment so that someone could be relieved of this disability" (*ibid.* (remarks of Rep. MacGregor)), it appears that no such amendment was offered.

That risk undoubtedly is a real one. This Court has indicated that civil commitment<sup>14</sup> may be ordered only in the presence of clear and convincing evidence that the individual involved presents a danger to himself or others, a showing that presumably is satisfied only in the presence of some objective indicia of serious abnormality. See *Addington*, 441 U.S. at 431-433; *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).<sup>15</sup> And once a finding of pronounced mental illness has been made, subsequent predictions about future dangerousness cannot be stated with confidence; "[d]espite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low." *O'Connor*, 422 U.S. at 584 (Burger, C.J., concurring). Indeed, as the Court has noted, at least "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability.'" *Estelle v. Smith*, 451 U.S. 454, 472 (1981).<sup>16</sup> And this problem may be compounded if—as in

<sup>14</sup> The Gun Control Act's disabilities also apply to persons who have been found not guilty of a crime by reason of insanity. *Redford v. United States Department of Treasury*, 691 F.2d 471, 473 (10th Cir. 1982).

<sup>15</sup> At the time of appellee's commitment, New Jersey law evidently required a finding, based on a preponderance of the evidence, that he posed a threat to himself or others. See note 4, *supra*; *State v. Krol*, 68 N.J. 236, 252, 344 A.2d 289, 298 (1975). As the facts of this case suggest (see pages 3-4 & note 3, *supra*), even under this standard commitment can be expected to follow from objective indicia of abnormality.

<sup>16</sup> The difficulty of predicting whether a given individual will become dangerous in the future has been widely acknowledged. See, e.g., Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974);



this case—the individual's "subsequent curative event" turns on his voluntary continuation of medication or other therapy. Cf. *New York Transit Authority v. Beazer*, 440 U.S. 568, 591-592 (1979).

Of course, the district court may well have been correct in its view that the uncertain nature of psychiatric judgments occasionally leads to mistaken commitments. J.S. App. 17a. See *Parham v. J.R.*, 442 U.S. 584, 612-613 (1979); *id.* at 628-629 (opinion of Brennan, J.). And we do not deny that many persons who have been committed to mental institutions subsequently lead unexceptionable lives. But Congress certainly was entitled to conclude that persons whose psychiatric problems were serious enough to have called for commitment or for an adjudication of incompetence may pose unusual risks of "becom[ing] dangerous" (114 Cong. Rec. 14773 (1968) (remarks of Sen. Long); cf. *id.* at 21829 (remarks of Rep. Bingham)), and to err on the side of caution in determining which psychiatric judgments or pronouncements of cure should be given force. Congress, in fact, was entitled to reason that commitment decisions—which are made in response to specific showings of abnormality—are more reliable than subsequent, general predictions about an individual's likely dangerousness in the indefinite future. While Title IV's prophylactic rule undoubtedly is imprecise, the impossibility of making foolproof predictions about any individual's future dangerousness makes that imprecision necessary if the statute is to serve its purpose. Cf. *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975); *Toner*, 728 F.2d at 129.

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Lambert, Sherwood & Fitzpatrick, *Predicting Recidivism Among First Admissions at Tennessee's State Psychiatric Hospitals*, 34 Hosp. & Community Psychiatry 951 (1983); Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 110-117 (1984); Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. Crim. L. & Criminology 226 (1978).

Against this background, Congress was under no obligation to base its legislative efforts on the district court's assessment of the "expanding" body of knowledge relating to the causes and treatment of mental illness (J.S. App. 18a). "In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979). See *Clover Leaf Creamery*, 449 U.S. at 463-464, 466; *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154 (1938). Here, while the nature and causes of the phenomenon are the subject of continuing debate, a substantial body of data indicates that persons who have been committed to mental institutions are more likely than are members of the general public to engage in violent acts.<sup>17</sup> That this data may be disputed should not have been relevant to the district court's analysis, for "[i]t is not within the competency of the courts to arbitrate in such contrariety." *Bradley*, 440 U.S. at 112, quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916).<sup>18</sup>

<sup>17</sup> See J. Monahan, *Predicting Violent Behavior* 115-117 (1981); Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 Am. J. Psychiatry 33 (1978); Durbin, Pasewark & Albers, *Criminality and Mental Illness: A Study of Arrest Rates in a Rural State*, 134 Am. J. Psychiatry 80 (1977); Zitrin, Hardesty, Burdock & Drossman, *Crime and Violence Among Mental Patients*, 133 Am. J. Psychiatry 142 (1976); Giovannoni & Gurel, *Socially Disruptive Behavior of Ex-Mental Patients*, 17 Archives of Gen. Psychiatry 146 (1967). See also Rabkin, *Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research*, 86 Psychological Bull. 1 (1979).

<sup>18</sup> Even if the rate of violent crime among those with a history of commitment is no higher than that among the general public, Congress justifiably may have believed that certain individuals with a

Indeed, the relatively uncertain and evolving nature of psychiatry, as well as the fallibility of individual psychiatric diagnoses, itself makes expansive restrictions on the acquisition of firearms by those with a history of commitment *necessary* to fulfill the "broad prophylactic purpose" of Title IV. *New Banner*, 460 U.S. at 118. Congress's decision not to impose equally absolute restrictions on a limited category of felons—who may not share the psychological characteristics of the mentally ill, and who may in the aggregate be better able than those with a history of mental illness voluntarily to conform their conduct to the law's requirements<sup>19</sup>—hardly makes the legislative scheme as a whole irrational. See generally *Schweiker v. Wilson*, 450 U.S. 221, 234-235 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Dukes*, 427 U.S. at 303.

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history of mental illness are likely to commit especially serious violent offenses. See 114 Cong. Rec. 21813 (1968) (remarks of Rep. Schwengel). Similarly, Congress may have feared that persons with a history of commitment pose a substantial danger to themselves. See *id.* at 21784 (remarks of Rep. Celler) ("It is not only deliberate murder, robbery and assault which this legislation seeks to reduce, but also acts of passion, and gun suicides which have grown to 11,000 in 1967"); *id.* at 21811 (remarks of Rep. Schwengel).

<sup>19</sup> Similarly, Congress was entitled to rely on the fact that the federal law enforcement officials who administer the Gun Control Act are experienced in making judgments about the rehabilitation and future dangerousness of persons who have violated the law; that sort of determination, which is routinely made in parole and related proceedings, is a familiar one in our legal system. But those officials are not in a position to make complex psychiatric judgments about the future conduct of individuals who have been pronounced cured and released from mental institutions.

#### **B. The Classification Created By Title IV Should Not Be Subjected To Heightened Scrutiny**

The conclusion reached above—that the challenged provisions of Title IV "rationally advance[ ] a reasonable and identifiable governmental objective" (*Wilson*, 450 U.S. at 235)—should end the equal protection inquiry, for the district court clearly erred in its lengthy dictum on the propriety of applying "intermediate" scrutiny" to the classifications at issue in this case. The district court concluded that regulations directed at "former mental patients" must be regarded as "quasi-suspect" to forestall the danger that such legislation may be grounded on "inaccurate and stereotypic fears." J.S. App. 10a (quoting *J.W. v. City of Tacoma*, 720 F.2d 1126, 1130-1131 (9th Cir. 1983)). The district court's approach, however, cannot be squared with the equal protection analysis set out in this Court's decisions.<sup>20</sup>

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<sup>20</sup> At the time that the district court issued its decision, this Court had reserved judgment on what standard of review applies to legislation expressly classifying the mentally ill as a discrete group. *Wilson*, 450 U.S. at 231 n.13. The decision below thus predated this Court's holding in *City of Cleburne v. Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985) that the mentally retarded do not constitute a quasi-suspect class for the purposes of equal protection analysis. Prior to the decision in *City of Cleburne*, several lower courts had used a rational basis standard in assessing the constitutionality of statutes classifying persons on the basis of a history of institutionalization. *Doe v. Colautti*, 592 F.2d 704, 711 (3d Cir. 1979) (rejecting attempt to preliminarily enjoin enforcement of state statute governing benefits for inmates of private mental institutions); *United States v. Jones*, 569 F. Supp. 395 (D.S.C. 1983) (rejecting equal protection challenge to 18 U.S.C. 922(h)(4)). Cf. *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y.), *aff'd*, 414 U.S. 1058 (1973) (addressing challenge to Medicare and Medicaid provisions affecting patients in psychiatric hospitals). The Ninth Circuit has held that the mentally ill do constitute a quasi-suspect class (*J.W. v. City of Tacoma*, 720 F.2d 1126 (1983)); its decision, however, was influenced by the substance of the challenged regulation—an ordinance hampering the establishment of



1. While this Court has looked to a number of criteria in determining whether regulations directed at given groups should be labeled "suspect" or "quasi-suspect" (see generally *Plyler v. Doe*, 457 U.S. 202, 216-218 & n.16 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973)), it invariably has held that classifications demanding heightened scrutiny have one necessary hallmark: "what differentiates [suspect classes] from \* \* \* nonsuspect statuses \* \* \* is that [a suspect] characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). See *Murgia*, 427 U.S. at 313; *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *id.* at 518 (Stevens, J., dissenting). Because "for most legislative purposes there simply are no meaningful differences" between members of a suspect or quasi-suspect class and the rest of the population (*Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring)), regulations burdening such classes "are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 6. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979). Such regulations therefore "demand close judicial scrutiny." *Toll*, 458 U.S. at 21 (Blackmun, J., concurring).

Reviewing this area of the law, the Court explained last Term:

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative

group homes for former mental patients in residential neighborhoods—which, in the court of appeals' view, denied the affected individuals a right "essential to [their] full participation in society." *Id.* at 1129.

choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

*City of Cleburne*, slip op. 8. Applying this test, the Court held in *City of Cleburne* that the mentally retarded are not a quasi-suspect class. The Court found it beyond dispute that mentally retarded individuals have a reduced capacity to function in society. *Ibid.* The Court therefore recognized that legislation "singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others." *Id.* at 10.

The same reasoning is fully applicable to regulations directed at persons with a demonstrated history of serious mental illness.<sup>21</sup> It is indisputable that "many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice," so that any differential treatment accorded such individuals will be "related, even if imperfectly, to real disabilities from which many of the mentally ill suffer." *Doe v. Colautti*, 592 F.2d

<sup>21</sup> As a preliminary matter, it is far from clear that Title IV in fact subjects those with a history of commitment, "as a discrete group, to special or subordinate treatment." *Wilson*, 450 U.S. at 231. As we explain above, while Section 925(c) withholds administrative relief from such individuals, "in so doing it imposes equivalent deprivation on other groups who are not mentally ill" (450 U.S. at 231). That is, it makes administrative relief equally unavailable to certain felons, to drug addicts, to fugitives from justice, to those dishonorably discharged from the armed forces, to individuals who have renounced United States citizenship, and to aliens illegally present in the United States. The challenged provisions thus make "a distinction not between the mentally ill and a group composed of nonmentally ill" (*id.* at 232), but between presumptively dangerous and presumptively non-dangerous persons. And the district court itself recognized that Congress acted properly when it placed persons with a history of commitment in the presumptively dangerous category. In these circumstances, the district court erred in reading the challenged provisions in isolation as "classify[ing] directly on the basis of mental health." *Id.* at 231 (footnote omitted).



704, 711 (3d Cir. 1979). By definition, persons whose psychological problems are serious enough to demand commitment or an adjudication of incompetence have exhibited instability or an inability to function in society, characteristics that undoubtedly are relevant to legislation—like Title IV—that relates to public safety. And the uncertain nature of psychiatric judgments suggests that at least some persons who have been released from commitment share these characteristics, or will again share them in the future.<sup>22</sup> See pages 19-21, *supra*. Certainly, “an impartial lawmaker could logically believe” that a classification grounded on a history of commitment “would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” *City of Cleburne*, slip op. 2 (footnote omitted) (Stevens, J., concurring). See *Fritz*, 449 U.S. at 180-181 (Stevens, J., concurring in the judgment).<sup>23</sup>

<sup>22</sup> Thus, given the fallibility of psychiatric diagnosis and the uncertainties concerning the causes, development and cure of mental illness (see page 19-21, *supra*), a history of mental illness is relevant to government regulation bearing on public safety. Certainly, once the presumptive relevance of an existing psychological abnormality is granted, a physician's opinion about changes in the mental state of a given patient should not affect the degree of constitutionally-mandated scrutiny accorded government classifications involving that patient.

<sup>23</sup> It is undeniable that commitment to a mental institution is an event that often is misunderstood, and one that may have unfortunate and unfair social consequences for the committee. See *Addington*, 441 U.S. at 425-426. As this Court has noted, however, “what is truly ‘stigmatizing’ is the symptomatology of a mental or emotional illness,” rather than commitment itself. *Parham*, 442 U.S. at 601. Indeed, empirical data indicate “‘that the stigma of mental hospitalization is not a major problem for the ex-patient.’” *Id.* at 601 n.12, quoting Schwartz, Myers & Astrachan, *Psychiatric Labeling and the Rehabilitation of the Mental Patient*, 31 Archives of Gen. Psychiatry 329, 333 (1974). This consideration suggests that disparate treatment accorded those with a history of commitment is grounded more on objective

There accordingly is no reason for the courts to presume that restrictions such as those found in Title IV were inspired by an unreasoning antipathy towards the mentally ill. To the contrary, the application of such a presumption, with its concomitant heightened scrutiny, would threaten to invalidate a significant body of legislation that is based on readily articulable and self-evidently legitimate concerns. Indeed, the Court's holding in *City of Cleburne* was in part inspired by its reluctance to “set out on [a] course” that would have granted quasi-suspect status to the “mentally ill.” Slip op. 12.

2. While this consideration suffices to dispose of the district court's intermediate scrutiny analysis, it should be noted that the other criteria set out in the Court's equal protection decisions also militate against treatment of Title IV's classifications as quasi-suspect. The Court in *City of Cleburne* noted that the affirmative legislative response to the problems posed by mental retardation “demonstrates not only that [the mentally retarded] have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.” Slip op. 9. The same sort of constructive legislative response is visible in the area of mental illness. See, e.g., 29 U.S.C. 794 (Rehabilitation Act of 1973); 42 U.S.C. 289k-1, 300x *et seq.* (Public Health Service Act); 42 U.S.C. 9401 *et seq.* (Mental Health Systems Act). At the same time, mental illness covers a broad spectrum of disorders with varying and often unpredictable prognoses, a factor suggesting that “governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping

considerations than on “irrational discrimination” (*Toll*, 458 U.S. at 20 (Blackmun, J., concurring)); certainly, regulations singling out such persons are of a different order than those classifying on the basis of race, religion, national origin or sex. See *City of Cleburne*, slip op. 6-7; *Plyler*, 457 U.S. at 216-217 n.14.

and limiting their remedial efforts." *City of Cleburne*, slip op. 11. Cf. *Rodriguez*, 411 U.S. at 28.

There also is no reason to believe that the normal political process will be unable to rectify improvident government action bearing on those with a history of commitment. Formerly institutionalized individuals, at least, have not been "relegated to \* \* \* a position of political powerlessness." *Rodriguez*, 411 U.S. at 28. Compare *City of Cleburne*, slip op. 9 (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that the mentally retarded often are formally excluded from participation in the political process). Because no special factors are at work in this area that may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities" (*Carolene Products Co.*, 304 U.S. at 152-153 n.4), there is no special call for close judicial scrutiny of restrictions affecting persons with a history of commitment.<sup>24</sup>

3. Finally, although the Court need not reach the question, it is worth adding that Title IV's restrictions would survive even elevated scrutiny, because they bear a "close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-725 (1982). The federal interest in preventing the misuse of

<sup>24</sup> While the Court also has made use of heightened scrutiny in cases bearing on the exercise of fundamental rights (see generally *Murgia*, 427 U.S. at 312-313), the opportunity to acquire a firearm has not been held to fall within this category. See *United States v. Miller*, 307 U.S. 174 (1939); *Lewis*, 445 U.S. at 65-66 n.8; *Toner*, 728 F.2d at 128; *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974). Similarly, Title IV's disability provisions—in contrast, for example, to the regulation at issue in *City of Cleburne*—hardly affect an interest so great as to deny persons with a history of commitment "much of what makes for human freedom and fulfillment." *City of Cleburne*, slip op. 6 (Marshall, J., concurring in the judgment in part and dissenting in part).

firearms is, of course, nothing short of "urgent." *United States v. Biswell*, 406 U.S. 311, 317 (1972). See *Lewis*, 445 U.S. at 63, citing S. Rep. 1097, *supra*, at 76-78; H.R. Rep. 1577, 90th Cong., 2d Sess. 7 (1968); S. Rep. 1501, *supra*, at 22-23. This interest is directly served by the Gun Control Act's "sweeping prophylaxis" against the acquisition of firearms by "presumptively dangerous persons." *Lewis*, 445 U.S. at 63-64. And the inclusion on this list of those with a history of commitment is not "an 'accidental byproduct of a traditional way of thinking'" (*Heckler v. Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 15-16, quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)); it is, instead, grounded on objective indicia of past instability.

The district court nevertheless suggested that Congress might have tailored Title IV's restrictions more precisely by permitting the acquisition of firearms by individuals with a commitment history who have demonstrated that they are not dangerous. J.S. App. 21a. But, as noted above, "[e]ven under the best of circumstances psychiatric diagnosis and therapy decisions are fraught with uncertainties." *Parham*, 442 U.S. at 629 (opinion of Brennan, J.). Any limitation on the broad congressional restriction—that is, any room for the application of questionable psychiatric judgments about future dangerousness—accordingly threatens to frustrate the congressional purpose. Because any mistake would have an immediate and disastrous effect on the public welfare, Congress was entitled to proceed in the gun control field with all the caution it deemed necessary.

**C. Even Assuming That Title IV Sweeps Too Broadly, The District Court Erred In Invalidating All Of Title IV's Restrictions On The Ability Of Mentally Ill Persons To Obtain Firearms**

There is one additional flaw in the district court's equal protection analysis: even if that court was correct in its finding that appellee has made out an equal protection



violation, its choice of remedy was erroneous. As the district court itself recognized (J.S. App. 21a), the equal protection violation in this case (if one exists) plainly is not Title IV's basic restriction on appellee's opportunity to purchase a firearm; it lies, rather, in the denial of "equal treatment" to appellee that is embodied in 18 U.S.C. 925(c)'s provision of administrative relief to certain felons but not to persons with a history of commitment. *Mathews*, slip op. 10. See J.S. App. 16a-18a. Upon finding a violation of this sort, the district court had "two remedial alternatives." *Mathews*, slip op. 9, quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). It could have "declare[d] [Section 925(c)] a nullity and order[ed] that its benefits'"—that is, the availability of administrative relief—"not extend to the class that the legislature intended to benefit, or it [could have] extend[ed] the coverage of the statute to include those who are aggrieved by the exclusion." *Mathews*, slip op. 9. See *id.* at 10 n.6 (citing cases); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). In choosing between these remedies, the court was obligated to "accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (opinion of Powell, J.). See *Mathews*, slip op. 9 n.5.

The district court, however, chose neither of these alternatives. Instead, it invalidated all of Title IV's underlying restrictions on the acquisition of firearms by persons who have been committed to a mental institution or adjudicated incompetent, a ruling that makes it lawful even for individuals who *presently* are under an order of commitment to purchase a firearm. Because this action went far beyond what was necessary to correct the asserted denial of equal treatment (see *Mathews*, slip op. 10), it was (despite the government's apparent suggestion to the con-

trary below<sup>25</sup>) beyond the "constitutional competence" of the court. *Westcott*, 443 U.S. at 91.

Indeed, even if the district court's chosen remedy otherwise was within its authority to grant, that remedy—far more than either the simple extension or the outright nullification of Section 925(c)—plainly acted to "circumvent the intent of the legislature." *Mathews*, slip op. 9 n.5, quoting *Westcott*, 443 U.S. at 94 (opinion of Powell, J.). In choosing a remedy for an equal protection violation, a court is obligated to "measure the intensity of [Congress's] commitment to the residual policy and consider the degree of potential disruption of the statutory scheme." *Mathews*, slip op. 9 n.5, quoting *Welsh*, 398 U.S. at 365 (Harlan, J., concurring in the result). Here, Congress made it clear beyond dispute that one of its central purposes in passing the Gun Control Act was to keep firearms out of the hands of persons who have suffered from "mental disturbances." 114 Cong. Rec. 21829 (1968) (remarks of Rep. Bingham). See *id.* at 13868 (remarks of Sen. Long); *id.* at 21780 (remarks of Rep. Sikes); *id.* at 21784 (remarks of Rep. Celler); *id.* at 21791 (remarks of Rep. Thompson); *id.* at 21812 (remarks of Rep. Schwengel); *id.* at 21838 (remarks of Rep. Lloyd); *id.* at 21835 (remarks of Rep. Gilbert); *ibid.* (remarks of Rep. Bolton); *ibid.* (remarks of Rep. Hanna); *id.* at 22251 (remarks of Rep. Scheuer); *id.* at 22262 (remarks of Rep. Fisher); *id.* at 22270 (remarks of Rep. Skubitz); *ibid.* (remarks of Rep. Cohelan); *id.* at 22747 (remarks of Rep. McClory); *id.* at 22752 (remarks of Rep. Reid); *ibid.* (remarks of Rep. Boland); *id.* at 23091 (remarks of Rep. Donahue); *id.* at 27152 (remarks of Sen. Dodd); *id.* at 27420 (remarks of Sen. Cannon).<sup>26</sup> Against this background, the district court's choice of remedy

<sup>25</sup> See Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss at 9.

<sup>26</sup> That Congress would have disapproved the district court's choice of remedy is confirmed by the inclusion of a strong severability



"involve[s] a restructuring" of the statute (*Westcott*, 443 U.S. at 92) that threatens to frustrate one of its principal aims. In the event that this Court affirms the district court's constitutional judgment, then, it nevertheless must vacate that court's invalidation of those portions of the Gun Control Act that impose disabilities on persons with a history of commitment.

**D. Title IV Does Not Create An Unconstitutional "Irrebuttable Presumption"**

The district court's alternative holding, which turned on its conclusion that the challenged provisions of Title IV create a constitutionally infirm "irrebuttable presumption," is equally flawed. As this Court has made clear, legislation that satisfies equal protection requirements "is perforce consistent with the due process requirement of the Fifth Amendment." *Salfi*, 422 U.S. at 770, quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). The question for due process purposes therefore is a simple one: "[W]hether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Salfi*, 422 U.S. at 777.

provision in Title IV. 18 U.S.C. 928 ("If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby."). That provision "discloses an intention to make the [statute] divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." *Welsh*, 398 U.S. at 364, quoting *Champlin Refining Co. v. Commission*, 286 U.S. 210, 235 (1932). It thus points up the emphasis that Congress placed on keeping the Gun Control Act's basic disability provisions in force. Cf. *Mathews*, slip op. 9 n.5; *Westcott*, 443 U.S. at 90.

The district court concluded that it was irrational for Congress to have based the imposition of firearms disabilities on a psychiatric determination, while declining to lift those disabilities in response to subsequent psychiatric evidence. J.S. App. 19a. As noted above, however, civil commitment is not simply the product of a predictive judgment; it generally may be ordered only in response to clear evidence that the individual involved presents a danger to himself or others. See page 19, *supra*. Presumably for this reason, the district court conceded a history of commitment to be a reasonable trigger for Title IV's disabilities. And once an individual is shown to have been dangerous, it hardly seems irrational, given the "fallibility of medical and psychiatric diagnosis" (*Parham*, 442 U.S. at 609), for Congress to have concluded that the individual poses a greater than normal risk of again "becoming a threat to society." *Scarborough*, 431 U.S. at 572.

In these circumstances, that the congressional rule sweeps too broadly by imposing disabilities on many non-dangerous persons—indeed, that it "filters out more members of the class than nonmembers" (*Salfi*, 422 U.S. at 777)—does not create constitutional difficulties. Congress obviously recognized that many of the persons affected by Title IV's disabilities would not misuse firearms were they able to obtain them. But in cases turning on psychiatric opinion, it may well be impossible (and certainly beyond the competence of law enforcement officials) to establish that any given individual will not be dangerous in the future. Cf. *Salfi*, 422 U.S. at 782-783 & n.15. It was for this very reason that Congress established class-wide disabilities. In such a scheme, where any error has potentially catastrophic consequences, "generalized rules" plainly "are appropriate to [Congress's] purposes and concerns." *Id.* at 785. And where its legislation so directly touches the safety of the public, Congress surely

may choose to establish rules that sweep too broadly rather than make do with rules that do not reach broadly enough. Cf. *id.* at 780; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-27 (1976).

#### CONCLUSION

The judgment of the district court should be reversed.

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#### APPENDIX

##### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides in pertinent part:

No person shall \* \* \* be deprived of life, liberty, or property, without due process of law \* \* \*.

2. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, provides in pertinent part: 18 U.S.C. 922(d)

It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person —

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) has been adjudicated as a mental defective or has been committed to any mental institution.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(1a)

## 18 U.S.C. 922(g)

It shall be unlawful for any person —

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

## 18 U.S.C. 922(h)

It shall be unlawful for any person —

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## 18 U.S.C. 925(c)

A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

3. Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, 18 U.S.C. App. 1202(a), provides in pertinent part:



Any person who —

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

**APPELLEE'S**

**BRIEF**

10  
No. 84-1904

Supreme Court, U.S.  
**FILED**

**FEB 10 1986**

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CLERK

In The

**Supreme Court of the United States**

October Term, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

*Appellant,*

-v-

ANTHONY J. GALIOTO,

*Appellee.*

*On Appeal from the United States District Court for the District  
of New Jersey*

**BRIEF FOR APPELLEE**

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## QUESTIONS PRESENTED

1. Whether Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 violates the Equal Protection or Due Process Clauses of the Fifth Amendment by permanently barring individuals who have previously been committed to a mental institution from receiving, transporting or shipping firearms in interstate commerce, without affording said individuals the same administrative relief which is given to certain convicted felons, pursuant to 18 U.S.C. § 925(c).

2. Whether or not those individuals who have been committed to a mental institution constitute a "quasi-suspect" class for purposes of equal protection analysis.

3. Whether the district court erred in remedying the constitutional violation by invalidating all of Title IV's restrictions on the acquisition of firearms by persons who have been committed to mental institutions, rather than by expanding the scope of 18 U.S.C. § 925(c) to include such persons or by nullifying those administrative relief provisions.

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UNITED STATES DEPARTMENT OF THE TREASURY,  
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*Appellant,*

vs.

ANTHONY J. GALIOTO,

*Appellee.*

*On Appeal from the United States District Court for the District  
of New Jersey*

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**BRIEF FOR APPELLEE**

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**OPINION BELOW**

The opinion and order of the district court (J.S. App. 1a-22a)  
are reported at 602 F. Supp. 682.



## JURISDICTION

The judgment of the district court (J.S. App. 23a) was entered on February 7, 1985. A notice of appeal (J.S. App. 24a) was filed on March 7, 1985. On April 25, 1985, Justice Brennan extended the time for docketing the appeal through June 5, 1985; the Jurisdictional Statement was filed on that date. The Court noted probable jurisdiction on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at pages 1a-4a of Appellant's Brief.

## STATEMENT OF THE CASE

In or about October, 1982, appellee attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. Ray's Sport Shop refused to sell a firearm to appellee when he answered "yes" to a question on the standard ATF questionnaire as to whether he had ever been committed to a mental institution. Appellee thereafter filed an Application for Relief from Disabilities on November 3, 1982 (JA16). The Secretary of the Bureau of Alcohol, Tobacco and Firearms replied on April 13, 1984, denying appellee's Application (JA20).

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 (Title IV) as amended by the Gun Control Act of 1968 (Gun Control Act), 18 U.S.C. § 921, *et seq.*, prohibits any individual who "has been adjudicated as a mental defective or who has been committed to any mental institution" from receiving, transporting or shipping a firearm or ammunition in interstate commerce [18 U.S.C. § 922(g)(4) and (h)(4)], and further makes

it unlawful for a federal firearms licensee knowingly to sell a gun to such person [18 U.S.C. § 922(d)(4)]. Title IV likewise prohibits the receipt by, transportation and sale of firearms to several other categories of persons, including those who have been convicted of felony, those who are under indictment, those who are fugitives from justice, or those who are unlawful drug users.

Title IV also empowers the Secretary of the Treasury to lift the disabilities imposed by Title IV on certain convicted felons.<sup>1</sup> Section 925(c) provides that a person who has been convicted of a crime punishable by imprisonment for a term exceeding one (1) year (other than crimes involving the use of a firearm or other weapon) may apply to the Secretary for administrative relief which may be granted if the Secretary is satisfied "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." (J.S. App. 27a).

On May 11, 1971, appellee voluntarily entered Fair Oaks Hospital in Summit, New Jersey, suffering from delusions. During the course of his hospitalization, he underwent drug and ECT therapy, was given full ground privileges, went home on a weekend visit and presented no behavioral problems. His treating doctor found that he was "not acutely psychotic or suicidal, and he is considered not dangerous to himself or others" (JA11).

After admission, appellee served notice on the hospital of his intention to leave prior to discharge. New Jersey law

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1. The relief provision also extends to those convicts prohibited from possessing a firearm, pursuant to 18 U.S.C. § 1202(a)(1) (Title VII of the Omnibus Crime Control and Safe Streets Act).

requires formal seventy-two hour notice from voluntary admissions to enable the hospital to evaluate the patient and, if necessary, seek his involuntary commitment. Fair Oaks did seek to commit appellee, and an Order of Commitment was signed on May 31, 1971 (JA7). Appellee was thereafter discharged as improved on June 5, 1971, by Dr. Alvarez, the physician who initially sought his commitment.

Appellee had never been treated for any mental or emotional illness either before or since his hospitalization at Fair Oaks. In 1981 appellee sought to obtain a New Jersey Firearms Purchaser ID Card. Dr. Alvarez, who had treated appellee at Fair Oaks submitted a Certification stating that "Mr. Galioto is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms" (JA13). On the strength of this Certification, appellee was granted a Firearms Purchaser ID Card (JA14).

Appellee filed suit in the United States District Court for the District of New Jersey challenging the constitutionality of the permanent ban on firearms possession imposed by Title IV. The district court granted appellee a summary judgment declaring those portions of Title IV unconstitutional which deprive appellee of his ability to purchase a firearm without affording him any opportunity to contest that disability (J.S. App. 21a).

The district court first found that "persons with a history of mental illness constitutes a quasi-suspect class deserving of intensified intermediate scrutiny" (J.S. App. 9a). The court did not rest its holding on that finding however, finding instead that the challenged provisions of Title IV are wholly irrational.

The court analyzed the disability provisions of Title IV and found that there existed a dichotomy of distinctions between present conditions and past events. Only convicted felons and

former mental patients were barred from gun ownership by a past event; however, only former mental patients were permanently disabled with no opportunity to overcome their disability.<sup>2</sup> The court found this distinction to be irrational and instead felt the permanent ban should be placed on convicted felons (J.S. App. 16a). The factors which led to the court's conclusion were as follows: (1) The bar is punitive which should more appropriately be applied to convicts; (2) Convict's prior acts are a good indicator of future dangerousness; (3) Former mental patients have not indicated anything more than that they were adjudged at one time to have a propensity for disruptive behavior; (4) The propriety of the commitment may never be fully explored due to a patient's release shortly after being committed, as in appellee's case; (5) Commitment proceedings are likely to have fewer procedural safeguards than criminal proceedings and are replete with erroneous factual findings (J.S. App. 16a-17a).

The court further found that the challenged statute violated appellee's due process rights by creating a permanent irrebuttable presumption of dangerousness. The court found this presumption irrational because "without any good faith extrinsic justification . . . it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed." (*Id.* at 19a.)

Finally the court found that the initial disqualification of former mental patients would not be irrational and unconstitutional if the statute provided a relief mechanism

---

2. Those convicted of crimes involving firearms or other weapons are also barred from challenging their disability. This factor could well be considered punitive, however, or alternatively a good indicator of a potential for future firearms abuse.

similar to that given to convicts. The court struck down those provisions of 18 U.S.C. § 921, *et seq.*, which deprived appellee of his ability to purchase a firearm (J.S. App. 21a).

### SUMMARY OF ARGUMENT

I. The district court held that the statutory scheme of Title IV which created a permanent ban on firearm possession for those with a history of commitment, while providing an administrative remedy for convicted felons, was wholly irrational. The court noted in dicta, however, that former mental patients did constitute a quasi-suspect class deserving of heightened scrutiny. Members of appellee's class share several characteristics which have been recognized by this court as indicia of their oppressed status. A civil commitment is an immutable trait which cannot be removed by expungement, pardon or collateral attack. Former mental patients also constitute a discrete and insular minority which has been subjected to a history of prejudice. *Plyler v. Doe*, 457 U.S. 202 (1982). Furthermore, former mental patients have been politically powerless, despite recent federal anti-discrimination legislation. 29 U.S.C. § 794, 42 U.S.C. § 9401. The civil rights of persons subject to involuntary commitment have only recently received the Court's attention. In *O'Connor v. Donaldson*, 422 U.S. 579 (1975), the Court required a finding of danger to self or others as a prerequisite to involuntary commitment. *Addington v. Texas*, 441 U.S. 426 (1979) held that states must sustain a burden of proof greater than a mere "preponderance of the evidence" in commitment proceedings to satisfy the Due Process Clause.

The class of former mental patients is made up of individuals who are currently mentally ill, those who were mentally ill and subsequently cured, and individuals who were not mentally ill but were committed erroneously. For the purposes of most legislation, and Title IV in particular, the traits and characteristics ascribed to former mental patients have been those of its most

visible sub-class, the mentally ill. Because of this generalization and simplification, former mental patients have been saddled with stereotyped concepts of irrational behavior and violence. These characteristics are not representative of the entire class, however, any more than terminally ill patients are representative of a hospital population. The stigma of over generalizations, coupled with the immutability of the record of commitment, serves to generate fear and mistrust of former mental patients in the general population long after discharge from the hospital.<sup>3</sup> In fact, unlike the mentally retarded whose disabilities can be measured, former mental patients do not have any universal traits or characteristics which are relevant to the concerns voiced by Congress. The fact that Congress has acted as though a propensity for violent behavior was a proven and well recognized attribute of former mental patients, calls for their treatment as a quasi-suspect class.

II. Assuming that former mental patients are not deemed to be a quasi-suspect class, it is respectfully submitted that the classification of Title IV fails the rational basis test. Title IV is irrational first because it seeks to classify on the basis of the commitment procedure, which is premised on psychiatric opinion and then refuses to accept that same opinion to relieve the disability. As set forth in Point II, *infra*, commitment procedures vary from state to state and have evolved over the course of time. Those who were committed fifty (50) years ago for sexual deviation, alcoholism, drug addiction, seizures and other physical

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3. Steadman, Henry J. and J. Coccozza, *Selective Reporting and The Public's Misconception of the Criminally Insane*, 41 Public Opinion Quarterly 523-33 (1978); Steadman, Henry J., *Critically Reassessing the Accuracy of Public Perceptions of the Dangerousness of the Mentally Ill*, 22 Journal of Health and Social Behavior 310-316 (1981) and Fracchia J., D. Canale, E. Cambria, E. Ruest and C. Sheppard, *Public Views of Ex-Mental Patients: A Note on Perceived Dangerousness and Unpredictability*, 38 Psychological Reports 495-498 (1976).



ailments as well as various criminal acts, would not necessarily be committed today, yet they are still subject to firearm disabilities.<sup>4</sup> Many others were committed under statutes with little or no procedural safeguards, such as, notice, appointment of counsel and an opportunity to be heard. (See Brief of N.J. Department of The Public Advocate as *Amicus Curiae*.)

Over and above the varying standards applied in different states and at different times, psychiatric predictions of dangerous in general are not very reliable. *Estelle v. Smith*, 451 U.S. 454 (1981). As cited by appellee previously, psychiatrists tend to "overpredict", that is err on the side of caution by suspecting and treating mental illness even where none exists (Motion to Affirm 10-14). In view of this professionally endemic tendency, a great many commitments must be questioned.

Nor do these psychiatric predictions gain any more validity when stamped with a judicial imprimatur. Initially it must be observed that most commitment proceedings, at least those in New Jersey, prior to 1975, were done on an *ex parte* basis, with no testimony and no independent evidence other than the doctor's certification (Brief of N.J. Public Advocate at 14). The court's signature on the order of commitment had far less import prior to the implementation of these most basic procedural safeguards.

Finally, it appears that Congress has mistaken correlation with rational relationship. There are a number of diverse correlates of dangerousness. Studies have documented these correlations, yet none have singled out any cause and effect relationship. It is irrational and unfair to single out one (1) group because of their political powerlessness and "rationally relate" that group to dangerous, violent or criminal behavior absent any

4. Brakel and Rock, *The Mentally Disabled and the Law*, 36-41 (1971).

empirical evidence. To do otherwise is to rely on stereotypical fears and prejudice.

III. Appellee submits that if the permanent firearm ban of Title IV is not facially invalid, then it is invalid as applied to appellee Galioto. This Court has declared unconstitutional as applied a Texas ordinance restricting group homes for the mentally retarded from residential zones without a special use permit. *City of Cleburne v. Cleburne Living Center Inc.*, 105 S. Ct. 3249 (1985). Although the Court found a rational basis for the ordinance on its face, the facts showed that there was no basis for requiring a special use permit for the group home sought to be established. In effect, the Court recognized that although there may be a rational basis for discriminatory treatment in general, that alone will not sustain a challenge to the statute, if the facts negate any reason for the distinction. Should the Court find that Title IV is constitutional on its face due to the marginal reliability of commitment proceedings as predictors of dangerousness, then it is respectfully submitted that the statute is still unconstitutional as applied to appellee. This assertion is based on the absence of any findings of "dangerousness" in appellee's commitment proceedings. As submitted *infra*, appellee was committed in 1971, long before this Court required a finding of dangerousness as a prerequisite to commitment. *O'Connor v. Donaldson*, *supra*. Appellee had been found to be suffering from a mental illness but had not been found to be a danger to himself or others. It is submitted that this factual finding is the only one which makes Title IV's blanket prohibition rational, and in the absence of said finding, the statute is unconstitutional as applied to appellee.

IV. In addition to the equal protection violations, Title IV also violates appellee's right to due process of law. This infirmity is based upon the statute's creation of an irrebuttable presumption. The statute presumes that former mental patients are all dangerous and that this fact is universally true in every case. It fails to

recognize the probability of erroneous commitments or of patients being cured of their mental illness. The statute further fails to acknowledge any degrees of mental illness and that most of those who are mentally ill are not violent or dangerous. Appellee is absolutely and permanently precluded from showing that the presumption is not true as to him. The presumption moreover is not based on empirical data or even expert opinion. Instead, it stems from an unreasoning fear and prejudice against the mentally ill, accepted as fact by an ill-informed and fearful populace and their legislators. One need only to look at the various characterizations used by Congress in discussing the class of persons restricted from gun ownership to understand their true concern and sensitivity for the mentally ill.<sup>5</sup>

No justification for the irrebuttable presumption can be advanced on a cost basis. The Secretary currently engages in review proceedings for convicted felons, and he has not alleged any concern for the additional cost of review proceedings for members of appellee's class. The sole justification advanced by the appellant is the lack of competence to engage in psychiatric predictions.

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5. "The demented, the deranged . . ." 114 Cong. Record 21812 (1968) (remarks of Rep. Schwengel); "mental cases," *id.* at 22262 (remarks of Rep. Fiskin); "the mentally deranged," *id.* at 21791 (remarks of Rep. Thompson); "lunatics," *id.* at 22747 (remarks of Rep. McClory); *id.* at 12305 (remarks Sen. Dodd); *id.* at 13863 (remarks Sen. Long); *id.* at 16292 (remarks Rep. Boland); "psychotics," *id.* at 21838 (remarks of Rep. Boland); "psycopaths," *id.* at 21835 (remarks of Rep. Gilbert); *id.* at 23091 (remarks of Rep. Donahue); "insane persons," *id.* at 11614 (remarks Sen. Thurmond); *id.* at 13642 (remarks Sen. Dodd); "idiot(s)," *id.* 12056 (remarks Sen. Tydings); "madman" *id.* at 12304 (remarks Sen. Dodd); *id.* at 16293 (remarks Rep. Boland); "certified madmen," *id.* at 12312 (remarks Sen. Dodd); "berserk killer," *id.* at 13621 (remarks Sen. Dodd); "idiots and morons," *id.* at 13868 (remarks Sen. Long); "certified lunatics," *id.* at 12443 (remarks Sen. Dodd); "nuts," *id.* 12477 (remarks Sen. Dodd); "psychopaths and nincompoops," *id.* at 16274 (remarks Rep. Eckhardt).

Appellant has likewise cited the low reliability of psychiatric predictions of dangerousness as well. Essentially, appellant contends that predictions of whether a former mental patient would safely handle a firearm would be fraught with danger and uncertainty. Congress was content to rely on those same psychiatric opinions in committing the individual and imposing the disability however. It is respectfully submitted that no more should be necessary to remove the disability as well, especially in view of the fact that appellant engages in review proceedings for convicted felons at the present. Appellee has been relegated to a second class citizen, with fewer rights than a convicted felon who willfully broke the law. The assertion that appellant is qualified to determine whether or not one with a history of violent crime has rehabilitated himself, but not to assess the capability of one who was formerly mentally ill to handle a firearm, smacks of a double standard grounded in prejudice. Appellee submits that same is also violative of his rights to due process of law.

V. The remedy chosen by the court was to invalidate those provisions of Title IV which precluded him from obtaining a firearm. The rationale of the court was based upon the due process violation which could not have been cured merely by striking the administrative relief provisions of § 925(c). Depriving convicted felons of their administrative remedy would only eliminate the equal protection violation and would fail to address the due process infirmity.

This Court has previously expressed its preference not to alter statutes by creating remedies, for that is a legislative function. *Rayonier Inc. v. United States*, 352 U.S. 315, 320 (1957). Thus while the court was competent to extend these benefits, *Heckler v. Matthews*, 104 S. Ct. 1387, 1395 (1984), the proper procedure in deference to the legislative role of Congress would be to strike out those offending portions of the statute and allow Congress to supply the remedy.



## ARGUMENT

### I.

#### FORMER MENTAL PATIENTS CONSTITUTE A QUASI-SUSPECT CLASS.

The district court held that the legislative scheme which afforded convicted felons a hearing while denying one to former mental patients failed to satisfy the rational basis test and was thus constitutionally infirm. In doing so, the court noted, in dicta, that former mental patients constitute a "quasi-suspect" class and are thus deserving of heightened scrutiny in an equal protection analysis, relying on *J.W. v. City of Tacoma*, 720 F. 2d 1126 (9th Cir. 1983) (J.S. App. 10a).

This Court has observed on numerous occasions that the Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike". *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The Court noted the rationale for designating certain classes as "suspect" in *Plyler v. Doe*, 457 U.S. 202 (1982). Justice Brennan writing for the Court observed,

"Several formulations might explain our treatment of certain classifications as 'suspect'. Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964);

*Hirabayashi v. United States*, 320 U.S. 81 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938). *Id.* at 216-217 (n.14)."

Other criteria identified by the Court leading to a finding of "suspect" classifications include the immutability of the trait or characteristic in question, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), a prior history of unequal treatment and political powerlessness; *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), designation as a discrete and insular minority subject to prejudice; *Graham v. Richardson*, 403 U.S. 365, 372 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (n.4) (1938).

*Plyler v. Doe*, *supra*, heralded a departure from the long accepted two-tiered analysis of equal protection criteria to add a third tier, the "quasi-suspect" class and "quasi-fundamental" rights analysis. 457 U.S. at 244 (Burger, C.J. dissenting). The majority opinion recognized that the children of illegal aliens did not meet all of the classical criteria of suspect classification, primarily because the characteristic or trait of being an "illegal" alien is the result of voluntary action. *Id.* at 219 n.19. Moreover, the characteristic is not immutable as for example race or sex.

The Court likewise held that education did not constitute a "fundamental right" guaranteed by the Constitution. *Id.* at 221, 223. Yet notwithstanding these findings, the Court nonetheless



applied heightened scrutiny to the statute denying the plaintiffs an education in public schools. The Court's decision can only be explained as a pragmatic variation of established principles in order to eradicate a social and moral injustice. The fact that the characteristics of the group and the nature of the benefits from which they were barred did not neatly fit the established guidelines, did not deter the Court from righting an obvious wrong.

The rationale used by the Court was not totally devoid of precedent however. The Court had previously acknowledged, though not labeled, the quasi-suspect status of illegitimate children in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1975) and *Trimble v. Gordan*, 430 U.S. 771 (1977). In addition, the Court has previously acknowledged, though not labeled, some benefits as "quasi-fundamental" rights. Beginning with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) this Court has recognized the right to vote as "a fundamental political right, because preservative of all rights". *Id.* at 370. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though it has not been recognized as a constitutional right; *San Antonio Independent School District v. Rodriguez*, *supra*, at 35, n. 78. *Plyler* was thus not an aberration, "depart[ing] from principled constitutional adjudication", *Plyler*, *supra*, at 243, Burger C.J. dissenting, but rather an explicit acknowledgment of the existence of quasi-suspect status as foreshadowed in the aforementioned cases. *Cf. Craig v. Boren*, 429 U.S. 218 (1976).

An alternative "continuum theory" has been urged by Justice Stevens as more reflective of equal protection decisions than the multi-tiered approach. *Craig v. Boren*, *supra*, at 212 (Stevens J. concurring); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985). (Stevens J. concurring). Justice Stevens has suggested that the Court's equal protection decisions can be seen as falling in a continuum from the "rational basis" analysis at one end to "strict scrutiny" analysis at the other end. According

to Justice Stevens, simple rationality can explain all of these decisions on a sliding scale as it were, with the Court demanding a greater showing of rationality from the government depending upon such factors as the nature of the right involved, the characteristics of the disadvantaged class, the tradition of disfavor experienced by that class and the legitimacy and importance of the legislations objective. *Cleburne*, *supra*, at 3261. *See also, Mathews v. Lucas*, 427 U.S. 495, 520-521 (Stevens J. dissenting). Placement of an equal protection analysis along this continuum involves a weighing of all the aforementioned factors and ultimately a balance test to determine if the object of the legislation outweighs the prejudice felt by the class in question.

It is respectfully submitted that former mental patients do constitute a "quasi-suspect" class or alternatively fall sufficiently far along the continuum to require more than the merest rational basis analysis. It must continually be borne in mind that the class of persons disfavored by the statute is those who have been committed to a mental institution, or former mental patients and not the mentally ill as the appellant suggests (Brief of Appellant 25). Appellant's argument is premised upon an unfounded assumption, *i.e.*, that the two classifications are interchangeable. This is precisely the error committed by Congress when it sought to use a convenient label to express its intention to keep firearms out of the hands of several "categories of presumptively dangerous persons." *Lewis v. United States*, 445 U.S. 55, 64 (1980). While the class of former mental patients undoubtedly includes those who are presently mentally ill, it also includes those who have been cured of their illness as well as those who were never mentally ill to begin with and erroneously committed. Moreover, it includes those who were committed under fifty different commitment laws and procedures and many individuals committed under old, archaic laws which have since been modified. The class includes those persons who under recent legislation have been adjudged to be dangerous to themselves or others as well as those who were

committed absent any finding of dangerousness. Because of the tremendous overbreadth of the class, describing the attributes and characteristics of the mentally ill which represents but one segment of the class in assessing the rationality of the statute is misleading and misses the thrust of appellee's challenge to the statute.

The class of former mental patients exhibit many of the criteria found by the Court to be characteristic of the quasi-suspect class. There can be no dispute as to the immutability of the commitment despite the fact that the condition which gave rise to the commitment may change and indeed be totally eliminated. Unfortunately, even though one may be cured, there is no mechanism available to expunge that from a person's medical records the way in which a criminal conviction may be expunged. Nor can a commitment be eliminated by executive pardon, appeal or collateral attack. Thus, like race or sex, once a person has been committed to a mental institution that commitment will remain with him the rest of his life.

Secondly, an involuntary commitment is a factor not chosen willingly but is instead imposed upon a person by an outside force. Like the children of illegal aliens in *Plyler, supra*, former mental patients did not choose their status. "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler, supra*, at 217, n.14. This trait was not true of course of the parents who voluntarily entered this country illegally. *Id.* at 219, n.19. Similarly, "[b]ecause illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, *Mathews v. Lucas*, 427 U.S. 495, 505 (1976), official discriminations resting on that characteristic are also subject to somewhat heightened review." *Cleburne, supra*, 105 S. Ct. at 3255.

Closely aligned to these criteria is the fact that former mental patients are a discrete and insular minority. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Former mental patients are forever marked by their status, much the same way aliens are singled out. *Graham v. Richardson*, 403 U.S. 375 (1971). Notwithstanding an individual's apparent present normality, a record of commitment undeniably alters society's perception of the individual, his interpersonal relations and his legal rights, privileges, immunities and liabilities. *Addington v. Texas*, 441 U.S. 418, 425-426 (1979). While it is true that the symptomatology of a mental or emotional illness is certainly stigmatizing, *Parham v. J.R.*, 442 U.S. 584, 601 (1979), that symptomatology affects only a limited sub-class of former mental patients. The stigma of the commitment, however, affects every member of the class.

Closely related to the insularity of the group is its political powerlessness. In this regard, it is instructive to note the numerous disabling statutes disenfranchising the "insane", "idiots" those "non compos mentis" and "adjudicated incompetents" and those "committed to a mental institution" as well as many statutes prohibiting similar individuals from holding office. See Brakel and Rock, *The Mentally Disabled and the Law*, 1971, p. 333. Table 9.4. Over and above these specific statutory disabilities is the lack of any political or social cohesiveness of former mental patients and their reluctance to engage in political or social activity. Appellant's reliance on the recent "constructive" federal legislation prohibiting discrimination against the handicapped, (Rehabilitation Act of 1973, 29 U.S.C. § 794) and proclaiming the rights of the mentally ill (Mental Health Systems Act, 42 U.S.C. § 9401 *et seq.*) as evidence of the reversal of this powerlessness is unpersuasive. The very fact that Congress recognized the need for a declaration of civil rights for the mentally ill attests to the inability of those mentally ill to effectively correct the rampant abuses in the states' mental health systems.



One cannot easily overlook the centuries of degradation and discrimination suffered by the mentally ill and others committed to mental institutions. Although medical science has progressed far from the days of the "snake-pit" much has yet to be accomplished in improving society's perception of former and present mental patients. Society in general still fears what it does not fully understand and it does not understand the problems of the mentally ill. See *Hearings on Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Committee on The Judiciary*, 91st Cong. 1st & 2d Sess. 62-63 (1969-1970); *Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1200 (1974). It was a mere ten years ago that this Court struck down commitment statutes based solely on a finding of "mental illness", requiring instead a finding of dangerousness to self or others, *O'Connor v. Donaldson*, 422 U.S. 563 (1975) and only seven years ago that this Court required states to meet a burden of proof greater than a mere "preponderance of the evidence" in order for a commitment procedure to satisfy the Due Process Clause. *Addington v. Texas*, 441 U.S. 426 (1979). To suggest that the statutes cited by appellant demonstrate . . . "That the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary," Brief of Appellant at 27, is akin to suggesting that racial prejudice ceased with *Brown v. Board of Education*, 347 U.S. 483 (1954) and passage of the Civil Rights Act of 1964. Such remedial legislation does not operate as a magic wand changing a politically powerless group which has suffered years on degradation and inhumane treatment into a group which no longer needs the special solicitude of an unbiased tribunal.

As Justice Marshall keenly observed last term

"Moreover, even when judicial action has catalyzed legislative change, that change certainly

does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject. See *Palmore v. Sidoti*, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 1879, 80 L. Ed 2d 421 (1984)." *Cleburne*, *supra*, 105 S.Ct. at 3269.

Thus, Congress' recognition of invidious sex discrimination and its attempts to correct long standing abuses stood as a confirmation of the Court's decision to extend heightened scrutiny to gender based classifications rather than a justification for the "laissez-faire" approach adopted in *Cleburne*. *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). The majority opinion in *Cleburne* cannot be read to countenance against heightened scrutiny in all cases where *some* remedial legislation has been passed, for to do so would inevitably lead to applying different standards of analysis to the same group at different times. Thus sex-based classifications would be judged by heightened scrutiny standards only until remedial legislation is passed to correct certain inequities. After that point, since the group is no longer politically powerless and since Congress has exhibited a proper cognizance of the groups needs, only a rational basis test would be necessary to properly assess the challenged statute or regulation. This result is clearly undesirable for several reasons. For example, how much legislation would be necessary to demonstrate an appropriate legislative response to overcome the need for judicial intervention? Would it be necessary for the remedial legislation to specifically address the alleged discriminatory act or would general non-discrimination mandates suffice? To what extent would the existence of similar discriminating statutes or regulations bear upon the court's determination, *i.e.* would the court engage in a balance test of discriminatory and remedial legislation? Application of these tests would not only be difficult to accomplish, it would also exacerbate



the existing uncertainty perceived in the court's equal protection analysis.

As Justice Marshall succinctly observed in his concurring and dissenting opinion in *Cleburne*,

"Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy or alienage because the Court views the trait as relevant under some circumstances but not others. That view—indeed the very concept of heightened as opposed to strict scrutiny—is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because 'mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions.' Ante, at 3258. Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation." 105 S.Ct. at 3270. (Marshall J. concurring in part, dissenting in part).

This same theory holds true for former mental patients as well. While there are certain situations where a hospitalization and commitment may indeed be relevant, it cannot be said to be a relevant factor in all cases. For example, the government would be hard pressed to justify a denial of housing or welfare benefits based solely on the existence of a prior commitment. On the other hand, a history of prior commitments might indeed be relevant in connection with regulations governing Medicare or Medicaid benefits. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Schweiker v. Wilson*, 450 U.S. 228 (1981).

The Court in *Schweiker* expressly reserved judgment on whether or not the mentally ill were deserving of heightened scrutiny because the challenged statute did not discriminate between the mentally ill and a group composed of non-mentally ill, but instead distinguished between residents in public institutions receiving Medicaid benefits and those residents in such institutions not receiving Medicaid funds. *Id.* at 232-233. The discriminating effect on the mentally ill thus was an indirect result and the legislative history failed to substantiate any intent to classify on the basis of mental illness. Such was not the case, however, in *J.W. v. City of Tacoma*, *supra*. In that case the City of Tacoma specifically required group homes for former mental patients to obtain a special use permit to operate in a residential zone. The Ninth Circuit found that the zoning ordinance distinguished group homes for former mental patients on the basis of prejudices and archaic and stereotypic notions. 720 F. 2d at 1129. The class was clearly identified and the distinctions were drawn with sufficient precision. Likewise in the case at bar, the statute is drawn with sufficient clarity for the Court to address the issue of the level of scrutiny to be applied to the class of former mental patients. The proscriptions of 18 U.S.C. § 922(d)(4) and (h)(4) are clear and unequivocal; firearms may not be sold to or received by those who had been committed to any mental institution. The relief provision of 18 U.S.C. § 925(c) is equally clear; only those prohibited from receiving or possessing a firearm pursuant to 18 U.S.C. § 922(h)(i) may obtain relief from the Bureau of Alcohol, Tobacco and Firearms. The ambiguity present in the statute examined in *Schweiker* is thus absent, enabling the Court to finally address the issue properly reserved in *Schweiker*.

## II.

**THE STATUTORY SCHEME VIOLATES APPELLEE'S  
RIGHT TO EQUAL PROTECTION OF THE LAW UNDER  
THE RATIONAL BASIS TEST.**

Assuming *arguendo*, that former mental patients do not constitute a "quasi-suspect" class, (*see* Point I, *infra*) and that no fundamental right is impinged, it is respectfully submitted that appellee's equal protection rights are nonetheless violated in that the statutory scheme is not rationally related to a legitimate governmental interest. Statutory distinctions will generally be upheld if the classification at issue bears some fair relationship to a legitimate public purpose. *Plyler v. Doe*, *supra*, at 216. The relationship should not be flimsy or implausible, nor one created after the fact through zealous legal advocacy. *Jimenez v. Weinberger*, 471 U.S. 628 (1974).

At the outset the Court must first determine the goal Congress sought to achieve and then weigh the rationality of the means used to achieve that goal. There is little dispute that Congress' *primary* goal was to keep firearms out of the hands of "presumptively dangerous persons". *Lewis v. United States*, 445 U.S. 55, 64 (1980). However, the punitive effect of denying gun ownership to certain groups of people, who are not presumptively dangerous, cannot be overlooked. Thus, Title VII's prohibition against illegal aliens, those who are dishonorably discharged from the armed forces and those who renounce their American citizenship, cannot stand on the same footing as felons, drug addicts and former mental patients. There is nothing in the legislative history to suggest that Congress viewed illegal aliens, those who are dishonorably discharged or who renounce their citizenship as particularly dangerous individuals. The only comments in the legislative history suggest that the dishonorably discharged and those who renounce their citizenship were added

by Senator Long as a response to the case of Lee Harvey Oswald, 114 Cong. Rec. 14773. Additionally, the punitive aspect of prohibiting one dishonorably discharged from owning a gun is exemplified by Senator Long's comments "If he is a veteran who has been discharged under conditions other than honorable, when he accepts that discharge, he knows he is giving up the right to carry firearms". 114 Cong. Rec. at 14774. No mention is made of the rationale for preventing illegal aliens from owning guns but it is consistent with the theory that gun ownership is a privilege which is earned by full and complete status as an American citizen, a status not shared by illegal aliens, those dishonorably discharged and those who have renounced their citizenship.

Congress was able to readily identify several present conditions which would prohibit a person from possessing a firearm. Thus, if one were a fugitive from justice, or presently under indictment for a crime punishable by a term exceeding one year or a drug addict, he would be barred from selling or receiving a firearm. Much harder to identify, however, are those who might use a firearm for criminal purposes. To prohibit such persons from obtaining guns, Congress used a past conviction as a disqualification. Equally as hard to predict would be those who would use a firearm irrationally. To achieve the goal of easy identification Congress chose a past civil commitment or adjudication as a mental defective as disqualifications. Recognizing that not all persons with a criminal record would use a firearm illegally, Congress drafted the relief provision of § 925(c). Thus the overbreadth of the initial disqualification could be minimized on a case by case basis to avoid any particular injustice. Appellant's reference to the untoward results of such a disqualification on gun manufacturers who could be put out of business by the conviction of a related company undoubtedly served as an impetus for the statutory amendments in 1965 which preceeded § 925(c). Brief of Appellant at 15-16. However, the original, narrow,

relief provision<sup>6</sup> gave way in 1968 to the present language which applies to all types of entities and all types of crime except for those relating to firearms. Thus today's relief provision affords relief to the wayward gun manufacturer as well as thieves, rapists and murderers. Appellant asserts that Congress could incrementally "adjust" the relief provisions as it did in 1968 after several years of experience but that it was under no obligation to extend relief to entirely new categories of "especially risky people". Brief of Appellant at 17 n. 12. A close reading of the 1968 amendment shows, however, that this is precisely what happened, unless one considers thieves, rapists and murderers not to be "especially risky".

Whether the result was intended or not, Congress chose not to address the overbreadth of § 922(d)(4) and (h)(4). This decision not to afford relief to former mental patients is defended on the theory that Congress concluded that sweeping prophylactic rules were needed due to the difficulty of making individual determinations of future dangerousness. Yet there is nothing in the legislative history that even suggests that Congress contemplated and rejected individual determinations for the reasons urged by appellant. The sole reference to a relief provision for those formerly committed to a mental institution shows nothing more than the fact that some Congressmen supported such an amendment and others didn't.<sup>7</sup> There was no decisive vote on

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6. Relief granted to applicant who would "not be likely to conduct his operations in an unlawful manner". Pub. L. No. 89-184, 79 Stat. 788.

7. The relevant exchange is as follows:

Mr. SIKES: I note on page 16 of the bill, under sub-section 4, it says in effect that a gun cannot be sold to a person who has been adjudicated in any court as a mental defective or committed under any court order to any mental institution.

(Cont'd)

the proposed amendment and no explanation for the failure of an amendment to be drafted.

Appellant urges that the decision to withhold relief from former mental patients was a conscious one, which "plainly was based on the congressional belief that, whatever the nature of any subsequent curative events, individuals who have been

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(Cont'd)

There are those who have been committed to a mental institution who have subsequently been cured and have had their rights as citizens restored to them. Would not the gentleman feel that this language should be clarified to permit those who have subsequently been cured and had their rights as citizens restored to be eligible to acquire weapons?

Mr. CELLER: Well, the case of an adjudicated mental defective presents a serious situation. I am not an expert on that; but we incline to the view that a mental defective should not be permitted to ship, transport or receive a gun or a lethal weapon.

Mr. SIKES: But if the courts have declared he is no longer mentally defective in that he has been given back his rights as a citizen, it would appear he would be entitled to acquire a weapon.

Mr. MacGREGOR: Mr. Chairman, will the gentleman yield?

Mr. CELLER: I yield to the gentleman.

Mr. MacGREGOR: That very point has been raised by a number of State officials and private medical doctors in the field of mental health. Again I invite the attention of the gentleman from Florida to the draftsmanship of an amendment so that someone could be relieved of this disability as set forth in the bill.



committed, though unfortunate, [are] too much of a risk to be allowed firearms privileges". Brief of Appellant at 18 (citing *New Banner*). The historical support for this "congressional belief" however is not the Congressional Record but the words of Justice Blackmun in *Dickerson v. New Banner Institute Inc.*, 460 U.S. 103 (1983) whose reasoning supplied the missing legislative history. Appellant has brought legislative history full circle with the manufacturing of congressional intent through the citation of previous judicial construction of congressional inaction.

The certainty of judgment as to future dangerousness ascribed to a civil commitment proceeding by appellant is by and large unsupportable. Commitment to a mental institution in and of itself is indicative of nothing more than the fact that the patient engaged in some disruptive activity. Numerous factors detract from any predictive significance which such an event might have. First and foremost is the commitment statute itself. Procedural safeguards vary with the state of commitment, the date of commitment and the length of commitment. Few states prior to *Addington v. Texas*, *supra*, and *O'Connor v. Donaldson*, 422 U.S. 563 (1975) required proof that a committee presented a danger to himself or others by clear and convincing evidence. Appellee Galioto was committed in New Jersey in 1971, at which time the statute and court rules did not require proof of danger to self or others by clear and convincing evidence. N.J.S.A. 30:4-48 required only that the medical director and attending physician believe the patient to be suffering from a mental illness of such character that the patient, if discharged, would probably imperil life, person or property. Upon such belief application could then be made to the court for an order authorizing hospitalization. The medical certificate in appellee's case shows that he was destructive against property. Dr. Alvarez executed the certificate which indicated that "I believe that the condition of this person is such as to require evaluation, care and treatment in a mental hospital" (J. App. 6). Similarly the Final Order of Commitment

found that appellee was a proper person to be confined in a mental hospital. Noticeably absent was any finding of danger to himself or others (J. App. 7). These applications were generally done without notice, oral testimony, or representation of the patient by counsel. (See Brief for the New Jersey Department of The Public Advocate, Division of Mental Health Advocacy as *Amicus Curiae*). As stated by the Public Advocate "had the more stringent due process protections which exist today existed in 1971, many persons would have been able to avoid involuntary hospitalization and the resulting firearms disability" (Brief of N.J. at 9). Under the new procedural safeguards and burden of proof, coupled with the requirement that a danger to self or others be shown, it is highly unlikely that appellee would have been committed given the history of his emotional problem; whether or not he would have, the very fact that doubt exists at all should militate toward a hearing procedure to overcome his firearms disability. Certainly the validity of any prediction of dangerousness based on commitments made in 1971 is highly suspect in view of the substantial change in commitment proceedings since *Addington* and *O'Connor*.

Over and above the procedural infirmities inherent in commitments from different states made at different times, either before or after *Addington* and *O'Connor*, there is an additional factor which detracts from the validity of a commitment as a predictive tool. As noted by the appellant, psychiatric predictions of dangerousness have a very low reliability. (Brief of App. at 19). Cf. *Estelle v. Smith*, 451 U.S. 454, 472 (1981).<sup>8</sup> Notwithstanding this low reliability, appellant asserts that

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8. Steadman & Coccozza, *Psychiatry, Dangerousness and the Repeatedly Violent Offender*, 69 J. Crim. L. & Criminology 226 (1970); Ennis & Litwack, *Psychiatry and the Presumptions of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974); Steadman, *The Right Not To Be A False Positive: Problems in The Application of the Dangerousness Standard*, *Psychiatric Quarterly*, 52 (Summer 1980).

Congress was still entitled to rely upon the commitment decisions as the basis for its prophylactic rule, recognizing the great difficulty in making foolproof predictions, *citing Weinberger v. Salfi*, 442 U.S. 749, 777 (1975). However, this Court did not grant "carte blanche" authority to Congress to use a broad prophylactic approach in each and every case where precise judgments were difficult to make. *Salfi* stands for the proposition that such an approach is justified where Congress "could rationally have concluded *both* that a particular limitation or qualification would protect against its occurrence, *and* that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777 (emphasis added). Appellant fails to address the second requirement of *Salfi*, *i.e.* that individual determinations are too costly or difficult. If the prediction of future behavior is too difficult or too imprecise to be used to relieve one of the disabilities, how then can it be acceptable to impose the disability in the first instance?

Appellant suggests that Congress could have believed that individuals with a history of mental illness are likely to commit especially serious violent offenses even if the rate of violent crime among that group were no higher than the general public. Congress could also believe that violent crimes are committed more often by blacks, hispanics and the poor but could such belief justify restricting gun ownership by members of those groups, even in the face of statistical supports?

Appellant seems to put forth the proposition that as long as there is *some* factual basis for the classification, then it meets the rational basis test. Were that the case then the restrictions of § 922(d) and (h) could be expanded to include all those who had ever been treated for a mental illness, those who voluntarily admitted themselves into mental institutions, alcoholics, the aforementioned blacks, hispanics and the poor, the young, males and individuals with marital problems. Since these groups tend

to have a higher than "normal" propensity for violent acts,<sup>9</sup> restriction of gun ownership from them should substantially reduce the misuse of firearms in this country. The obvious reply is that these classifications are not rational for three reasons. First, it cannot be presumed that all or even many blacks for example, will misuse firearms simply because they exhibit a higher crime rate than whites. Secondly, whatever acts of violence are engaged in by each of these groups makes up only a small percentage of the total violent acts committed each year, which includes every race, creed, color, age and socio-economic class. Third, and perhaps most important, dangerousness per se, is not directly related to color or sex or age or socio-economic class. It is a phenomenon comprised of too many variables to be able to isolate and identify one particular trait such as race or mental illness and find a direct correlation.

Prof. John Monahan and Henry J. Steadman conducted a study between 1968 and 1978 for the National Institute of Justice on the correlation of crime and mental illness.<sup>10</sup> The conclusion they reached is that the relationship between crime and mental illness has more to do with demographic factors—age, gender, race, social class, life history—than with any direct causal link. Isolating one single variable, in this case mental illness, without controlling the other correlates, reinforces the stereotyped fears and prejudices by establishing a false causal relationship. Appellant's suggestion that Congress could "justifiably" reach this conclusion even in the absence of empirical data, (Brief of

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9. National Strategy To Reduce Crime, National Advisory Commission on Criminal Justice Standards and Goals at 10-19 (1973); Crime in the United States, Uniform Crime Reports, U.S. Department of Justice at 161-231 (1985).

10. Monahan and Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, Crime and Justice: An Annual Review of Research, Vol. 4 (1983).



App. at 21, n.18) ignores the most basic tenet of the rational basis test *i.e.* "where individuals in the group affected by the law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued." *City of Cleburne v. Cleburne Living Center*, 103 S. Ct. *supra* at 3255. Congress thus *must* find a distinguishing characteristic in order to justify differential treatment.

Appellant has failed to identify that characteristic shared by former mental patients which is so immutable as to bar them *permanently* from gun ownership. While appellant makes many references to the uncertainty and difficulty of assessing future dangerousness, it asks former mental patients to bear all of the risk of erroneous decisions by accepting psychiatric opinion as a trigger to the disability, yet refusing to accept that same testimony to remove it. Appellant then adds insult to injury by relegating former mental patients to second class citizens by giving a right to a review hearing to convicts, whose voluntary criminal activities have caused them to forfeit their privilege of gun ownership. To classify such a scheme as rational strains credulity and makes a mockery of the Equal Protection Clause.

### III.

#### THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO APPELLEE GALIOTO.

Last term the Court had occasion to review the constitutionality of a Texas ordinance which required group homes for the mentally retarded to obtain a special use permit in order to operate in a residential zone. *City of Cleburne v. Cleburne Living Centers, Inc.*, *supra*. Justice White, writing for the Court examined the characteristics exhibited by the mentally retarded

and found for several reasons that they did not constitute a "quasi-suspect" class. The Court declined to exercise heightened review of the ordinance essentially "[B]ecause mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions and because both state and federal governments have recently committed themselves to assisting the retarded . . ." 105 S. Ct. at 3258. The Court then turned to an examination of the effect of the *Cleburne* ordinance on the Cleburne Living Center home. The Court struck down the ordinance since the "record did not reveal any rational basis for believing the Featherston home would pose any special threat to the city's legitimate interest." *Id.* at 3259.

The Court's use of an "as applied" basis of review allowed the Court to avoid finding the ordinance facially invalid. The reasoning of the Court seems to indicate that even though a statute may be rational in the abstract, if the factors which make it rational do not apply to the person challenging the statute, then it may be unconstitutional as applied to that person. The case *sub judice*, presents a factual scenario which peculiarly lends itself to this "as applied" analysis. The Government's main rationale for upholding the validity of the Gun Control Act's permanent ban against receipt or transport of firearms by those who have been committed to a mental institution, is that a mental commitment is a valid barometer of future dangerousness. Appellant argues that Congress could have rationally believed that those who have been committed have been found to be dangerous and could reasonably be expected in the future to present a danger to society.

Without detracting from appellee's disagreement with this proposition (*see* Point II, *infra*) or the disagreement of the several *amici* in this case, appellant's defense of the statutes rationality may have some validity for commitments occurring after 1979. Subsequent to the Court's decisions in *Addington v. Texas*, *supra*, and *O'Connor v. Donaldson*, *supra*, states began revising their



commitment proceedings to require a finding of dangerousness and to require proof by clear and convincing evidence. As pointed out by *amicus* New Jersey Department of the Public Advocate, it was not until the 1975 case of *State v. Krol*, 68 N.J. 236 that the New Jersey Supreme Court construed the state commitment statute to require a finding of danger to self or others (Brief of N.J. at 11). Judicial commitments prior to that date were based merely upon a finding of mental illness, as was appellee's own commitment (Joint App. 7). Thus, the linchpin of the appellant's argument for rationality, the adjudicated finding of dangerousness, is missing from those commitments which occurred in New Jersey prior to 1975. Although there *may* be a rational basis for upholding the statute where the initial commitment proceeding results in a finding that the committee is a danger to himself or others—and this fact is certainly not conceded—that rationality disappears where the initial commitment involves no such finding. Absent any determination of dangerousness attendant to the commitment process, the permanent irrebuttable ban imposed by the statute has no factual basis and instead must be based on ignorance, prejudice and irrational stereotypes. It is one thing to believe that someone may present a danger in the future where he has already been adjudicated to be dangerous based upon expert opinion. It is quite different however, to believe that someone will be a danger in the future based solely on a finding that he was once mentally ill and a proper person to be confined in a mental institution. Appellant's observation that at the time of appellee's commitment, New Jersey law evidently required a finding, based on a preponderance of the evidence, that he posed a threat to himself or others (Brief of App. at 19 n. 15) is erroneous and misleading. The record is clearly devoid of any such finding and the authority cited by appellant to support this proposition, *State v. Krol*, *supra*, did not exist until four years after appellee's commitment.

Based upon the foregoing, application of the Gun Control Act's permanent ban to appellee lacks the rational basis necessary

to pass constitutional muster. There is no basis for a finding that the presumption of dangerousness accompanying a civil commitment under present law was present in 1971. Absent that critical finding, § 922(d)(4) and (h)(4) should be declared unconstitutional as applied to appellee.

#### IV.

#### THE STATUTORY SCHEME DEPRIVES APPELLEE OF SUBSTANTIVE DUE PROCESS.

The statute violates appellee's substantive due process rights by presumptively denying appellee the right to present evidence to establish that he is capable of handling firearms safely. This Court recognized in *Vlandis v. Kline* that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." 412 U.S. 441, 446 (1973). An analysis of the rationale used by the Court in striking down statutes that have relied upon irrebuttable presumptions, shows the Court's concern with absolute prohibitions to address issues deemed crucial by the legislature. In *Bell v. Burson*, 402 U.S. 535 (1971), for example, the Court struck down a statute which mandated an immediate suspension of an uninsured motorist's drivers license if he was involved in an accident and could not post security. The Court reasoned that the requirement that security be posted presumed the fault of that driver yet the statute failed to give him the opportunity to rebut that presumption. Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1973) the Court struck down an Illinois statute that presumed that all unmarried fathers were unqualified to raise their children. Upon the death of the natural mother, the state took custody of the illegitimate child and placed the child for adoption. The natural father was not permitted to show his fitness as a parent. Since parenting ability was in issue, the Court invalidated the statute because of its failure to allow unmarried

fathers an opportunity to demonstrate his ability. *Vlandis v. Kline*, *supra*, dealt with a Connecticut statute which charged higher tuition for out of state students and fixed residency as the legal address of the student for any part of the one-year period immediately prior to his application for admission to a Connecticut college or university. The student was precluded from controverting that determination, regardless of his or her subsequent establishment of a bona fide residence in Connecticut. Justice Stewart writing for the Court said

"In sum, since Connecticut purports to be concerned with residence in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, *when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.*" 412 U.S. 452 (emphasis added). See also, *Carrington v. Rash*, 380 U.S. 89 (1965).

The foregoing cases illustrate the Court's concern for the procedural due process rights of individuals. Irrebuttable presumptions impose less of an administrative burden on government but do so at the expense of individual interests. "[T]he Constitution recognizes higher values than speed and efficiency". *Stanley v. Illinois*, *supra*, at 656.

The concern addressed in 18 U.S.C. § 921 *et seq.* appears to be dangerousness. A review of the legislative history shows that Congress was concerned about keeping firearms out of the hands of those individuals who would present a danger to society by misusing the guns. *Lewis v. United States*, *supra*. Congress then sought to designate those groups of people whose current

condition presents too great a risk for society to bear. Therefore, those who are presently drug addicts, fugitives from justice or under indictment for a crime punishable by more than one year in jail, are all singled out for firearm disabilities by § (d)(4) and (h)(4). Additionally, two groups of individuals were designated by a past event, from which Congress presumed a finding of present dangerousness; persons convicted of a felony and persons adjudicated as mental defectives or committed to a mental institution. Congress allowed convicted felons to overcome their disability with a hearing procedure set forth in § 925(c) but instead made the inference of dangerousness for those adjudicated mentally defective or committed to a mental institution conclusive and irrebuttable. Having thus made the predictability of dangerousness the key to firearm possession, Congress foreclosed any possibility of challenging this presumption for members of appellee's class. Appellant concedes that Congress was aware that many of the persons affected by Title IV's disabilities would not misuse firearms were they able to obtain them (Brief of App. at 33). Therefore, even though it acknowledges that the presumption is not universally true in fact, Congress nonetheless refuses to allow individuals the chance to prove that they fall outside the scope of the presumption.

The irrebuttable presumption in § 922(h)(4) is particularly repugnant because psychiatric evidence and opinion is deemed acceptable to create the presumption, yet unacceptable to rebut the presumption. The statute is predicated on the issue of "dangerousness" but it precludes appellee and others from controverting the presumption that they are dangerous. Although there may be cases where a civil commitment is a good indicator of future dangerousness, just as some unmarried fathers may be poor parents, the presumption is not universally true in fact. Appellee simply requests the opportunity to present evidence to overcome that presumption.



Appellant has not contended that reasonable alternative means for making this determination do not exist or that they are cost prohibitive. Indeed appellants current administrative hearings for convicted felons belie any such claim. Appellant's reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975) is thus ironic since the dual requirement set by the Court in that case cannot be met here.

"Whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, *and* that the expense and other difficulties of individual determinations justified that inherent imprecision of a prophylactic rule." *Id.* at 777. (Emphasis added.)

Not being able to rely on the expense of individual determination to justify the statute's omission, appellant theorizes that Congress was concerned with the inability of law enforcement to make appropriate judgments about future dangerousness (Brief of Appellant at 33). Appellant cites no legislative support for this theory. On the contrary, appellant asserts that law enforcement officials are experienced in making judgments about the rehabilitation and future dangerousness of convicts (Brief of Appellant at 22). Once again, no authority is cited to support his bold assertion. Appellant conveniently overlooks the high rate of recidivism in our prison system<sup>11</sup> as well as the numerous studies documenting the corollary between frequency and degree of crimes and future dangerousness. See Monahan, *The Clinical Prediction of Violent Behavior* p. 71 (1981).

11. Examining Recidivism, Greenfeld, L. U.S. Dept. of Justice, Bureau of Justice Statistics (1985).

I dare say that the appellant could not with any degree of success greater than mere chance, predict which criminals would handle a firearm responsibly, and which would use it to commit a crime. His ability or inability to do so however, should not be the basis for a permanent bar against appellee having the facts of his case reviewed. The secretary of the Bureau of Alcohol, Tobacco & Firearms has broad discretion in granting or denying relief pursuant to § 925(c). Should he have any reservation about any applicant's ability to handle a firearm, he could deny the application, which denial would undoubtedly be upheld unless based on the wrong criteria or unless it were arbitrary, capricious or unreasonable. Due process does not demand a particular result, it simply strives to give everyone the same opportunity to be heard.

The illogic of this particular presumption is that Congress is satisfied with the accuracy of psychiatric opinions when used in the framework of fifty different commitment statutes to impose the burden of the presumption, yet it refuses to accept those same opinions to remove the burden. Would it not be just as irrational in a civil commitment context to be able to commit an individual on the strength of two medical opinions of dangerousness yet refuse to accept those same doctors' opinions that the individual was later cured and no longer in need of inpatient care? If Congress is willing to accept a certain margin of error in withholding benefits from citizens, should it not be forced to share that risk equally with the individual in restoring those benefits? *Addington v. Texas*, *supra*, at 427.

Finally, the irrebuttable presumption established by the statute is especially repugnant due to the hearing procedure afforded to certain felons. Logic suggests that if any group should be conclusively barred from possessing firearms, it should be those who have demonstrated by their voluntary acts, their inability to lead a law-abiding life. As stated by this Court in *Plyler v. Doe*, *supra*, "The legal burdens should bear some relationship



to individual responsibility or wrongdoing.” 457 U.S. at 220. One who has wilfully broken the law should not be rewarded by being given greater procedural rights than one whose disability arises from no fault of his own. Moreover, this Court has recently recognized that there is a high degree of correlation between past criminal acts and predictions of future dangerousness. *Jones v. United States*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 3043, 3049 (1983). The link between a civil commitment and future dangerousness is certainly much more tenuous. The civil commitment is proof only that the individual was capable of some disruptive behavior and nothing more. As this Court observed in *Addington*, “At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is, in fact, within a range of conduct that is generally acceptable.” 441 U.S. at 426-427. To provide a hearing procedure for convicted felons to show that they have rehabilitated themselves and are capable of owning a firearm while denying such a procedure to innocent former mental patients that same right in the absence of any clear and convincing administrative justification constitutes a blatant violation of the Due Process Clause.

## V.

### THE DISTRICT COURT PROPERLY INVALIDATED ALL OF TITLE IV'S RESTRICTIONS ON THE ABILITY OF FORMER MENTAL PATIENTS TO OBTAIN FIREARMS.

The district court based its finding of unconstitutionality on substantive due process as well as equal protection grounds (J.S. App. 18a). In doing so, the court determined that 18 U.S.C. § 921 *et seq.* offends the due process rights of former mental patients because it deprives them permanently and without any rational basis of the opportunity to demonstrate that they are no longer, or never were, incapable of handling firearms safely. (J.S. App.

15a). Therefore, the basic restriction placed by the statute on the opportunity of a former mental patient to purchase a firearm is *itself* invalid in that it creates an irrebuttable presumption that one who has been committed, regardless of the circumstances, is forever mentally ill and dangerous (J.S. App. 18a). “When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down.” *City of Cleburne, Texas v. Cleburne Living Center*, 105 S. Ct. 3249, 3274 (1985) (Marshall J., concurring in the judgment in part and dissenting in part).

We are not here dealing merely with a denial of equal treatment brought about by 18 U.S.C. § 925(c)'s provision of administrative relief to certain felons but not to persons with a history of commitment. We are also dealing with a statute whose underlying restrictions on the acquisition of firearms by former mental patients are unconstitutional in the absence of some provision for the granting of relief from disability to former mental patients in appropriate cases (J.S. App. 21a). However, appellant attacks the district court's choice of remedy by stating that the invalidation of all of Title IV's restrictions “went far beyond what was necessary to correct the asserted denial of equal treatment” and was therefore “beyond the ‘constitutional competence’ of the court.” (See App. Brief at 30, 31.) Appellant's argument thus incorrectly assumes that the statute is constitutionally defective solely on equal protection grounds and overlooks the fact that its basic restrictions are also invalid on due process grounds. That being so, appellant's contention that the district court had only two remedial alternatives<sup>12</sup> is inapposite. It was well within the constitutional competence of the district court to declare

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12. Appellant contends that the district court could have ordered that the administrative relief made available by 18 U.S.C. § 925(c) be withdrawn from the class that the legislature intended to benefit (certain felons), or it could have extended the coverage of the statute to include those who are aggrieved by the exclusion (former mental patients) (App. Brief at 30).

unconstitutional provisions of 18 U.S.C. § 921 *et seq.* which have been used to deprive appellee of his ability to purchase a firearm without affording him any opportunity to contest that disability.

In fact, the remedy which the district court adopted and which the government now attacks was the only alternative, other than a finding that the statute was constitutional and valid, which the government in its argument below contended was available to the district court. "If the court were to disagree with the Government's position [that no constitutional infirmity existed], it would then have to invalidate the regulations which deny firearm permits to persons who . . . have been committed to mental institutions. It is axiomatic that this Court could not create a review procedure for people in plaintiff's category. That would be a legislative function." Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss (Oct. 16, 1984) at 9. This Court has previously expressed its unwillingness to alter statutes that are constitutionally defective, claiming that if a statute needs to be modified, "that is a function for the same body that adopted it." *Rayonier Incorporated v. United States*, 352 U.S. 315, 320 (1957).

However, this Court has, on a number of occasions, extended the benefits of a statute in order to cure a constitutional defect. See *Califano v. Westcott*, 443 U.S. 76, 91 (1979) (citing cases). Indeed, as appellant contends, whenever a statute violates the Equal Protection Clause of the Constitution, the appropriate remedy is either a withdrawal of benefits from the favored class or an extension of benefits to the excluded class. *Heckler v. Mathews*, 104 S. Ct. 1387, 1395 (1984); *Westcott*, 443 U.S. 89; *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). As argued previously, however, the district court was not, in the present case, limited to a choice between these two alternatives since the statute in question here

violates not only the appellee's right to equal protection but his substantive due process rights as well.

Thus, while the district court properly invalidated Title IV's restrictions on the ability of former mental patients to obtain firearms, both the equal protection and due process violations of the statute would have been cured had the district court chosen instead to extend the availability of administrative relief provided in 18 U.S.C. § 925(c) to prior mental patients as well as to certain felons. Such an extension of administrative relief would eliminate the irrational distinction between former mental patients and ex-convicts which causes the statute to run afoul of the Equal Protection Clause of the Constitution. It would also afford to former mental patients the opportunity to demonstrate that they are no longer, or never were incapable of handling firearms safely, thus removing the irrebuttable presumption which the statute creates in violation of their due process rights.

The same result could not be said to have attended had the district court chosen to invalidate 18 U.S.C. § 925(c), thereby eliminating the availability of administrative relief to certain felons (thus making it available to no one). Certainly such a remedy would have cured the equal protection violation of the statute. Neither former mental patients nor ex-convicts would be able to obtain administrative relief from firearm disabilities imposed by statutory restrictions. However, the statute's violation of due process rights of former mental patients would not be cured by such a remedy. Without being given the opportunity to show that they no longer present the danger against which the statute was intended to guard, former mental patients, regardless of the circumstances, would be presumed, without rationality, to be forever mentally ill and dangerous and therefore incapable of handling a firearm.

Accordingly, two alternatives are available to this Court to

remedy the constitutional infirmities of 18 U.S.C. § 921 *et seq.* The first alternative is to affirm the judgment of the district court, thereby invalidating all of Title IV's restrictions on the ability of former mental patients to obtain firearms. While such a ruling would make it lawful even for individuals who presently are under an order of commitment to purchase a firearm and would thus frustrate the purpose of Congress in passing the Gun Control Act, (App's Brief at 30), this Court could stay the effective date of its order for a period of time, as the district court proposed to do, so as to afford Congress an opportunity to correct the constitutional defects found to exist in the present legislation. (See J.S. App. 21a, 22a). The second alternative is to uphold the underlying restrictions which the statute places on the ability of former mental patients to obtain firearms, but to create a review procedure whereby relief from the disability may be granted in appropriate cases.

### CONCLUSION

For the foregoing reasons, it is respectfully requested that judgment be entered alternatively:

- (1) Affirming the judgment of the district court; or
- (2) Partially affirming and modifying the judgment of the district court to expand the application of 18 U.S.C. § 925(c) to include appellee; or
- (3) Partially affirming and modifying the judgment of the district court to declare 18 U.S.C. § 922(d)(4) and (h)(4) unconstitutional as applied to appellee.

Respectfully submitted,

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# **REPLY BRIEF**

No. 84-1904

Supreme Court, U.S.

FILED

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT

v.

ANTHONY J. GALIOTO

ON APPEAL FROM  
THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEW JERSEY

REPLY BRIEF FOR THE APPELLANT

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1986

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## REPLY BRIEF FOR THE APPELLANT

Appellee and the amici that support him devote most of their attention to an attack on the wisdom of the statutory scheme, arguing that a history of mental illness does not strongly correlate with future violence and that, in any event, Congress could have drawn more precise lines in establishing firearms disabilities under Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 921 *et seq.* Given the debatable nature of appellee's empirical assertions and the uncertainties inherent in psychiatric diagnosis, however, contentions of this sort should be directed to—and must be resolved by—Congress.

1. a. At the outset, the suggestion by appellee (Br. 12-21) and his supporting amici (American Psychological Association (APA) Br. 12; Coalition for the Fundamental Rights and Equality of Ex-Patients (CFREE) Br. 9) that the

mentally ill constitute a "quasi-suspect" class entirely fails to come to grips with the central aspect of equal protection analysis: whether "individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement." *City of Cleburne v. Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 8. After this Court's decision in *City of Cleburne* that the mentally retarded have characteristics of that sort and therefore are not a quasi-suspect class, it is difficult to believe that appellee's argument is seriously advanced. See *id.* at 12. But it is clear, in any event, that a history of mental illness may legitimately be taken into account by Congress.

Appellee (Br. 29-30) and his amici (APA Br. 13-17) suggest obliquely that commitment is irrelevant to the statutory goal of keeping guns from potentially dangerous persons because commitment decisions are flawed and many committees are not dangerous. At the same time, however, appellee and the amici implicitly recognize the limited force of this empirical argument, for they shrink from following their reasoning to its logical conclusion—that, because commitment cannot serve as a proxy for dangerousness, it is irrational for Congress to bar even individuals *currently* under commitment orders from obtaining firearms. To the contrary, the APA acknowledges (Br. 18) that a majority of the states withhold firearms from persons with mental disabilities and that all 50 states deny such persons certain rights; the APA compares Title IV unfavorably to these statutes only because Title IV also reaches persons with a history of commitment (Br. 20-22).<sup>1</sup> This implicit concession that mental disorder is relevant to the achievement

<sup>1</sup>Appellee's other amici apparently recognize that guns may be withheld from persons who currently are institutionalized (see CFREE Br. 30; New Jersey Department of the Public Advocate and American Civil Liberties Union of New Jersey Br. 16, 21).

of legitimate legislative goals is well-taken, for it seems self-evident that guns may be kept from persons who have been found incapable of functioning in society.<sup>2</sup>

Once the relevance of mental disorder is acknowledged, it follows that Congress also may take a history of mental illness into account in legislation bearing on public safety. As the Chief Justice has noted, rates of cure for mental illness are relatively low (see *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring)); appellee's amici themselves recognize (New Jersey Department of the Public Advocate and American Civil Liberties Union of New Jersey (NJDPA) Br. 19-20) that a significant number of those afflicted with mental disorders do not recover fully. And while we certainly do not contend that all forms of mental illness are incurable, we explained in our opening brief (at 26 & n.22) that the fallibility and uncertainty of psychiatric diagnosis—a fallibility repeatedly recognized by this Court<sup>3</sup>—makes it impossible to predict with certainty that a given individual with a history of mental disorder

<sup>2</sup>The APA (Br. 14 & n.27) takes issue with our suggestion that a finding of dangerousness to oneself or to others is a prerequisite to commitment. This Court, however, recently characterized its decision in *O'Connor v. Donaldson*, 422 U.S. 563 (1975) as holding "that a nondangerous civil committee could not be held in confinement against his will." *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983). See *Addington v. Texas*, 441 U.S. 418, 429 (1979); *O'Connor*, 422 U.S. at 575 (there is "no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom"). In any event, however the relevant standard is articulated, it hardly seems unreasonable to withhold firearms from persons who are, in the APA's words, "gravely disabled" (Br. 14) "because they are unable to provide for their basic needs as a result of mental illness or disorder" (Br. 1a).

<sup>3</sup>See *Barefoot v. Estelle*, 463 U.S. 880, 932 (1983) (Blackmun, J., dissenting); *Estelle v. Smith*, 451 U.S. 454, 472 (1981); *Parham v. J.R.*, 442 U.S. 584, 609 (1979); *id.* at 629 (opinion of Brennan, J.); *Addington v. Texas*, 441 U.S. 418, 430 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 584, 589 (1975) (Burger, C.J., concurring).



never will manifest symptoms of that illness in the future. Against this background, heightened scrutiny of legislation classifying on the basis of a commitment history is inappropriate, because such legislation cannot be presumed to reflect prejudice rather than "the real and undeniable differences" between persons with such a history and others. *City of Cleburne*, slip op. 10.

b. It bears repeating that the other criteria relevant to the Court's use of "intermediate scrutiny" also are absent in this case.<sup>4</sup> While there is no denying the stigmatization and past mistreatment of the mentally ill (Appellee Br. 13; APA Br. 5-10; CFREE Br. 10-12), this Court has noted that "what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness" rather than commitment itself. *Parham v. J.R.*, 442 U.S. 584, 601 (1979). Although appellee asserts that persons affected by mental illness are politically powerless, his amici acknowledge (APA Br. 20-21 & n.52) that formerly institutionalized persons may participate in the political process and that, in a number of states, even those currently suffering from a mental disorder are not denied the right to vote. And appellee himself recognizes the breadth of the class affected by Title IV (Br. 15), a factor

<sup>4</sup>Amicus CFREE's suggestion (Br. 32-50) that the right to acquire firearms must be considered fundamental for purposes of equal protection analysis is entirely without merit. In the context of a Fifth Amendment challenge to Title VII of the Gun Control Act of 1968, 18 U.S.C. App. 1201 *et seq.*, the Court has flatly held that "[t]hese legislative restrictions on the use of firearms . . . [do not] trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980). See *id.* at 65-66 n.8 (characterizing *United States v. Miller*, 307 U.S. 174, 178 (1939) as holding that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'").

that militates against the application of heightened scrutiny here. See Gov't Br. 27-28.<sup>5</sup>

2. In next arguing that Title IV is wholly irrational, appellee (Br. 29-30) and his amici (APA Br. 22-27; CFREE Br. 16-21) rely principally on empirical data suggesting that persons with a history of commitment are no more likely than are members of the general public to commit violent crimes. But the validity of Congress's action hardly stands or falls on the empirical conclusions drawn by appellee's chosen set of psychiatrists. In fact, appellee's own data—presented in its most complete form by the APA—is far from conclusive: there are admitted gaps in the empirical base (see APA Br. 23 n.55, 25 n.61) and the cited studies fail to address such central questions as the *severity* of the crimes that are committed by persons with a history of mental illness. Indeed, the APA acknowledges (Br. 25) that, at least since 1965,<sup>6</sup> the arrest rate for persons released from mental institutions has *exceeded* that of the general population; while the APA attributes this circumstance to demographic factors that are unrelated to mental illness (Br. 25-27), the studies on which it relies for this proposition

<sup>5</sup>Appellee (Br. 17) and his amici (APA Br. 8) acknowledge the body of federal law intended to benefit the mentally ill, while maintaining (Appellee Br. 18-21) that the existence of this legislation does not bear on the level of equal protection scrutiny applicable here. In *City of Cleburne*, however, the Court stated that an affirmative legislative response to the problems of a given group, while not determinative, makes the call for intrusive judicial oversight less compelling. Slip op. 9.

<sup>6</sup>The APA asserts (Br. 24-25) that, prior to 1965, persons released from mental institutions had lower arrest rates for violent crime than did the general public. The causes (such as conservative release policies)—and even the existence—of this phenomenon are subjects of dispute, however. See, e.g., J. MacDonald, *Psychiatry and the Criminal* 93 (2d ed. 1969); Rappeport & Lassen, *Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population*, 121 *Am. J. Psychiatry* 776 (1965).

draw only tentative conclusions and recognize that even those conclusions are disputed.<sup>7</sup>

<sup>7</sup>See, e.g., Rossi, Jacobs, Monteleone, Olsen, Surber, Winkler & Wommack, *Violent and Fear-Inducing Behavior Associated With Hospital Admissions*, 36 *Hosp. & Community Psychiatry* 643, 643-644, 647 (1985) (cited at APA Br. 26 n.63; acknowledges that a number of recent studies present "sobering evidence about the potential for violence in psychiatric patients" by showing former mental patients to be more dangerous than previously believed, and urges caution in the use of empirical data to draw conclusions about the behavior of the mentally ill); Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 *Am. J. Psychiatry* 593, 593-594, 597 (1985) (cited at APA Br. 23 n.55, 24 n.59, 26 n.63; describes the dangerousness of former mental patients as a "longstanding controversy," acknowledges the existence of conflicting data, and recognizes that study finding demographic factors determinative is "rendered problematic by several methodological limitations"); Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 *Am. Psychologist* 794, 795, 797 (1984) (cited at APA Br. 26 n.63; acknowledges that some studies show former mental patients to have higher arrest rates than the general population, and that obtaining data in the area calls for highly subjective judgments); Ribner & Steadman, *Recidivism Among Offenders and Ex-Mental Patients: A Comparative Analysis*, 19 *Criminology* 411, 412 (1981) (cited at APA Br. 22 n.55; acknowledges the existence of studies showing that released mental patients have much higher arrest rates than does the general population); Steadman, Coccozza & Melick, *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals*, 135 *Am. J. Psychiatry* 816, 816-817 (1978) (cited at APA Br. 23 n.55, 26 n.63; acknowledges that arrest rates for ex-patients are three times that of the general population, that such arrests are most often for assault, robbery and rape, and that conclusions on the subject are based on "unwieldy data that are most difficult to obtain"). Cf. Durbin, Pasewark & Albers, *Criminality and Mental Illness: A Study of Arrest Rates in a Rural State*, 134 *Am. J. Psychiatry* 80, 83 (1977) (noting "discrepant findings reported in the literature" and cautioning that "[d]efinite conclusions are difficult and generalizations are risky"); Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 *Am. J. Psychiatry* 33, 42 (1978) (noting tentativeness of empirical conclusions); Giovannoni & Gurel, *Socially Disruptive Behavior of Ex-Mental Patients*, 17 *Archives Gen. Psychiatry* 146, 151-152 (1967) (noting

Perhaps more telling, it seems well-settled that the suicide rate of persons with a history of mental illness is strikingly and disproportionately high.<sup>8</sup> Some researchers, moreover, reject the APA's reasoning altogether, concluding that a history of commitment *does* correlate with higher rates of future violent criminal activity.<sup>9</sup> This sort of disagreement, of course, is far from unusual in the "baffling field of psychiatry." *O'Connor*, 422 U.S. at 578 n.2 (Burger, C.J., concurring). See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 899-900 (1983).

As we explained in our opening brief (at 21-22), it is Congress's role to resolve this debate. In attempting to prove that Congress erred as a factual matter in concluding that persons with a history of commitment pose a greater

discrepancies in the literature and explaining that conclusions vary depending upon the statistical sample used).

Even taking the APA's empirical observations at face value, past commitment to a mental institution—which concededly correlates with higher rates of violent crime—remains an accurate proxy for future violence. Requiring Congress to legislate more precisely by insisting that it impose disabilities only on persons committed to institutions who have prior arrest records, as suggested by the APA (Br. 22), would impose upon Congress an obligation to draft its statutes with precision that repeatedly has been eschewed by this Court. See, e.g., *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).

<sup>8</sup>See, e.g., Eastwood, Stiasny, Meier & Woogh, *Mental Illness and Mortality*, 23 *Comprehensive Psychiatry* 377, 383 (1982); *Suicide: How to Reduce the Rate*, 224 *Nature* 12, 13 (1969).

<sup>9</sup>See, e.g., Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 *Am. J. Psychiatry* 33, 40 (1978); J. MacDonald, *Psychiatry and the Criminal* 93 (2d ed. 1969). Cf. Rappeport & Lassen, *Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population*, 121 *Am. J. Psychiatry* 776, 779-780 (1965); Mezzich, Evanczuk, Mathias & Coffman, *Symptoms and Hospitalization Decisions*, 141 *Am. J. Psychiatry* 764, 767 (1984) (violent behavior is one symptom showing highest correlation with decision to admit patient to a psychiatric hospital).



than usual risk of misusing firearms, appellee accordingly "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which [the Court] may take judicial notice, that the question is at least debatable.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). See *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983). Given "the divergence of medical opinion in this vexing area" (*O'Connor*, 422 U.S. at 579 (Burger, C.J., concurring)) outlined above, the congressional action at issue here easily meets that test.

3. Appellee's related argument (Br. 23) that Title IV is unconstitutional because it makes relief available to a subcategory of felons but not to persons with a history of commitment demonstrates a similar misunderstanding of Congress's role. Felons on the one hand, and persons with a history of mental illness on the other, obviously present entirely distinct sets of characteristics, and there is no reason to believe that Congress was obligated to—or should have—treated the two identically. Law enforcement officers, for example, have considerable experience in making predictions of future dangerousness in the criminal justice context, and are able to recognize the characteristics that indicate a propensity for future criminality by those who have violated the law.<sup>10</sup> See, e.g., *Barefoot*, 463 U.S. at 897; *Estelle v. Smith*, 451 U.S. 454, 473 (1981).<sup>11</sup> In contrast,

<sup>10</sup>Appellee (Br. 24) and his amici (NJDP Br. 48, 53) misstate the reach of 18 U.S.C. 925(c) in asserting that it excludes only felons who have committed firearms offenses. In fact, the provision entirely withholds relief from any felon who has committed any crime involving the use of a weapon. This excluded category approximates the group of violent felons who, appellee's amici recognize, are the persons most likely to commit future crimes of violence (see APA Br. 22-23 n.55).

<sup>11</sup>See generally S. Rep. 98-225, 98th Cong., 1st Sess. 9 (1983) (footnote omitted) (addressing the Comprehensive Crime Control Act of

those officers plainly are not in a position to make complex psychiatric judgments about persons who have been released from mental institutions.

In any event, as we explained in our opening brief (at 14-18), the relief provision in 18 U.S.C. 925(c) is a narrow exception to the otherwise blanket disability imposed on all categories of presumptively risky people;<sup>12</sup> it originally was enacted to remedy a particular problem affecting firearms manufacturers, and subsequently was expanded to benefit what is still a narrowly circumscribed group of felons. See note 10, *supra*. If this sort of decision to act "one step at a time" (*Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)) is open to constitutional challenge, Congress will lose its ability to legislate altogether. Legislation necessarily involves the drawing of fine and often debatable lines. Here, for example, Congress could have imposed firearms disabilities on other presumptively dangerous groups (such as, perhaps, persons who have been arrested), which may well pose more of a risk than many of the categories listed in Titles IV and VII. But Congress's failure to do so—like its failure to provide relief to most of the categories of persons that are listed—does not invalidate the eminently reasonable restrictions that it did enact: "It is no requirement of equal protection that all evils of the same genus be

1983, Congress observed that "the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release").

<sup>12</sup>Appellee contends (Br. 22-23) that disabilities were imposed on several of the listed categories of persons as punishment, rather than because persons in those categories were considered potentially dangerous. In fact, however, Congress made it clear in its legislative findings that it believed the listed groups to present an unusual risk of violent activity. See Pub. L. No. 90-351, § 901, 82 Stat. 225; 18 U.S.C. App. 1201.



eradicated or none at all." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949). See Gov't Br. 17.<sup>13</sup>

4. The remaining challenges to the rationality of Title IV offered by appellee and its amici—principally, that commitment decisions are too unreliable to be credited absent the availability of an individualized relief mechanism (NJDPa Br. 27-41) and that the disability created by Title IV is irrational as applied to appellee because he is not dangerous (Appellee Br. 30-33)—are premised on a misunderstanding of the congressional purpose. Congress did not base Title IV on the assumption that all formerly institutionalized persons are dangerous, as the NJDPa asserts (Br. 18). To the contrary, Congress plainly understood that many such persons would not misuse firearms were they able to obtain them, just as it surely recognized that not all felons found guilty of firearms offenses will commit violent crimes in the future. But Congress concluded that those characteristics are associated with increased rates of violent crime,<sup>14</sup> and therefore used them as "a convenient, although

<sup>13</sup>The APA contends (Br. 18-22) that Title IV is suspect because, by imposing disabilities upon persons with a history of commitment, it makes use of an unusually broad prophylactic rule. Congress's choice of such a rule, however, simply reflects its conclusion—enunciated both in formal findings and in the legislative history of Title IV—that the abuse of firearms poses extraordinary dangers to the public. See Pub. L. No. 90-351, § 901(a)(2), 82 Stat. 225 (availability of firearms to presumptively dangerous groups "is a significant factor in the prevalence of lawlessness and violent crime in the United States"); 18 U.S.C. App. 1201 (availability of firearms to presumptively dangerous groups is a threat to the exercise of constitutional rights and to the effective operation of the government); H.R. Rep. 1577, 90th Cong., 2d Sess. 7 (1968); S. Rep. 1097, 90th Cong., 2d Sess. 76-78 (1968); S. Rep. 1501, 90th Cong., 2d Sess. 22-23 (1968).

<sup>14</sup>That is true even of commitments ordered prior to 1975 that did not make use of the substantive and procedural protections mandated by *O'Connor v. Donaldson*, *supra*, and *Addington v. Texas*, 441 U.S. 418 (1979). At least for purposes of creating firearms disabilities, Congress was entitled to rely on procedurally flawed commitments, recognizing

somewhat inexact, way of identifying 'especially risky people.' " *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 120 (1983), quoting *United States v. Bass*, 404 U.S. 336, 345 (1971).

Once the relevance of a history of mental illness is recognized, the necessity for the use of sweeping and absolute prophylactic rules is evident. Congress's failure to create a relief provision for formerly institutionalized persons was not motivated by considerations of expense or administrative convenience, as the APA supposes (Br. 28-29); instead, Congress plainly believed that the fallibility of psychiatric diagnosis makes it impossible to predict with certainty that a person with a history of mental disorder will not manifest

that even individuals committed by judicial officers in such circumstances most likely do suffer from mental disorders. Cf. *Lewis v. United States*, 445 U.S. 55, 66 (1980). And Congress certainly was justified in keeping weapons out of the hands of persons who had been found unable to function in society, whether or not they specifically had been labeled dangerous; indeed, studies prior to this Court's decisions in *O'Connor* and *Addington* found that former mental patients had higher arrest rates for violent crime than did the general population. See, e.g., J. MacDonald, *Psychiatry and the Criminal* 93 (2d ed. 1969); Rapoport & Lassen, *Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population*, 121 Am. J. Psychiatry 776, 779-780 (1965). See note 2, *supra*. In any event, it should be added that the statute pursuant to which appellee was committed required a finding—both by his attending physician and by the medical staff of the institution that he had entered voluntarily—that appellee "if discharged, [would] probably imperil life, person or property." N. J. Stat. Ann. § 30:4-48 (West 1981). Commitment could then be ordered upon a judicial finding that appellee suffered from "mental disease to such an extent that [he] • • • require[d] care and treatment for his own welfare, or the welfare of others, or of the community" (N. J. Stat. Ann. § 30:4-23 (West 1981); see N. J. Stat. Ann. § 30:4-27 (West 1981))—language evidently understood to mean that he was "dangerous to self or to society." *State v. Krol*, 68 N. J. 236, 252, 444 A.2d 289, 298 (1975) (citation omitted). The arguments by appellee and his amici about the validity of disabilities imposed upon persons who were committed under statutes that lack such a requirement accordingly are wholly hypothetical.

symptoms of mental illness in the future.<sup>15</sup> While statisticians may be able to state with confidence that, as an empirical matter, a substantial number of formerly institutionalized persons will not suffer from recurrent mental disorders, this Court has recognized that the uncertainties of psychiatry "often make[] it very difficult for the expert physician to offer any definite conclusions about any particular patient." *Addington v. Texas*, 441 U.S. 418, 430 (1979). See *id.* at 429; Gov't Br. 19-20. In these circumstances, where any mistake about a particular patient would have catastrophic consequences, congressional use of a "sweeping prophylaxis" (*Lewis v. United States*, 445 U.S. 55, 63 (1980)) was plainly justified.

This conclusion also points up the flaw in appellee's suggestion that Title IV is unconstitutional as applied to him. Congress reasonably determined that, at least where a matter as crucial as gun ownership is involved, the state of psychiatric knowledge does not allow for adequate assurances that a person with a history of mental illness never will

<sup>15</sup> Appellee (Br. 24-26) and his amici (NJDPA Br. 45 & n.30) assert that Congress never articulated its rationale for imposing permanent firearms disabilities on persons with a history of mental illness. This Court, however, has found the congressional motivation plain from the face of the statute: "Congress obviously felt that such a person, though unfortunate, was too much of a risk to be allowed firearms privileges." *New Banner Institute*, 460 U.S. at 116. The legislative history confirms that Congress was concerned about the special risks posed by "persons with records of mental instability." 114 Cong. Rec. 22270 (1968) (remarks of Rep. Fino). And even had Congress failed to explain its rationale, "[w]here, as here, there are plausible reasons for Congress' action, [the court's] inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' *Flemming v. Nestor*, 363 U.S. [603], 612 [1960], because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). See *McDonald v. Board of Election*, 394 U.S. 802, 809 (1969).

have a recurrence. Appellee's suggestion that this finding should not apply to him (or to others in his circumstances) because he was not in fact, or no longer is, dangerous—even if accurate<sup>16</sup>—would render Congress's prophylactic rule nugatory.

5. Finally, appellee's related contention (Br. 28) that Title IV creates an unconstitutional irrebuttable presumption may be given short shrift. Appellee and his amici (APA Br. 17; NJDPA Br. 57) assert that it is irrational to rely on psychiatric judgments when imposing a disability, while declining to lift the disability in response to favorable psychiatric testimony.<sup>17</sup> As we explained in our opening brief (at 20), however, a commitment decision is made in immediate response to evidence that the individual is dangerous and unable to function in society. In contrast, the evidence upon which appellee would rely involves a far more tenuous and unreliable prediction of long-term dangerousness. See Gov't Br. 19-20 n.16. Cf. *Barefoot*, 463 U.S. at 936 n.14 (Blackmun, J., dissenting); *O'Connor*, 422 U.S. at 589 (Burger, C.J., concurring). Where the right involved is not a

<sup>16</sup> In fact, as noted above (note 14, *supra*), appellee was found dangerous by his attending physician and by the medical staff of his institution. Moreover, while appellee (Br. 26) and the NJDPA (Br. 28 n.17, 33 n.20) suggest that appellee was found to present a danger only to property, his physician indicated that he was "assaultive" (J.A. 5, 6, 8) prior to his commitment and "became extremely violent" after his voluntary admission to an institution (J.A. 8). Although the record does not reflect any recurrence of such behavior following his release from the institution, appellee was given antipsychotic drugs (J.A. 11) and apparently has remained under a physician's care since that time (J.A. 12).

<sup>17</sup> In fact, the two judgments are not equivalent. While psychiatric testimony certainly has a significant effect on commitment judgments, the ultimate decision that an individual should be institutionalized generally is made—as it was in this case (see J.A. 7)—by a judicial officer. The prediction of future dangerousness upon which appellee relies, in contrast, involves the unreviewed judgment of a psychiatrist (see J.A. 12, 13).

fundamental one, and where any error puts the safety of the public directly at risk, Congress cannot be faulted for acting cautiously in choosing which psychiatric judgments to credit.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

MARCH 1986



**AMICUS CURIAE**

**BRIEF**

FEB 10 1986

JOSEPH F. SPANIOLO, JR.,  
CLERK

No. 84-1904

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
*Appellant,*

v.

ANTHONY J. GALIOTO,  
*Appellee.*

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On Appeal from the United States District Court  
for the District of New Jersey

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**BRIEF OF AMICUS CURIAE  
AMERICAN PSYCHOLOGICAL ASSOCIATION  
IN SUPPORT OF APPELLEE**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

No. 84-1904

UNITED STATES DEPARTMENT OF THE TREASURY,  
 BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
 v. *Appellant,*

ANTHONY J. GALIOTO,  
*Appellee.*

On Appeal from the United States District Court  
 for the District of New Jersey

BRIEF OF *AMICUS CURIAE*  
 AMERICAN PSYCHOLOGICAL ASSOCIATION  
 IN SUPPORT OF APPELLEE

INTEREST OF *AMICUS CURIAE*

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 60,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country.

One of APA's major functions has been to foster understanding about mental illness, its causes, consequences, and cures, through the promotion of psychological research, the improvement of research methods, and the dissemination of information through meetings, scientific publications and special reports. A substantial number of APA's

members are concerned with the collection of data and development of research pertaining to persons who have been or may become dangerous to themselves or others and the provision of therapy to such persons. The APA wishes to inform the Court about scientific knowledge bearing on the legal issues to be decided in this case.

The APA has participated as *amicus* in many cases in this Court involving mental health issues, including, in the current Term, *Smith v. Sielaff*, No. 85-5487 (admissibility of testimony by defendant's mental health expert in capital cases); *Lockhart v. McCree*, No. 84-1865 (whether "death qualified" juries are "conviction prone"); *Ford v. Wainwright*, No. 85-5542 (constitutionality of applying death penalty to condemned persons who are mentally incompetent); and *Bowers v. Hardwick*, No. 85-140 (constitutionality of outlawing private, consensual sexual conduct between adults).

Appellant and Appellee have both consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of this Court.

### SUMMARY OF ARGUMENT

Traditionally, mentally disordered and formerly mentally disordered people have been discriminated against, scorned, and rendered politically powerless. As such, they share many central characteristics with classifications deemed constitutionally suspect. This Court need not decide in this case, however, the still-unresolved issue of the level of scrutiny appropriate to legislative classifications that single out the mentally disordered for special burdens. Application of the careful "rational basis" analysis that, in *City of Cleburne v. Cleburne Living Center*, — U.S. —, 87 L. Ed. 2d 313 (1985), invalidated a statute burdening the mentally retarded similarly invalidates the statute here at issue under the Equal Protection Clause. Point I.

Title 18, sections 922(g)(4) and (h)(4) of the United States Code ["the statute"] automatically and permanently disqualifies from shipping, transporting or receiving any firearm in interstate or foreign commerce "any person . . . who has been committed to any mental institution." The statute is anachronistic, based on the stereotype of mentally disordered people as permanently dangerous. No other current state or federal law of which *amicus* is aware permanently and unreviewably imposes legal disabilities based solely on a history of mental disorder or civil commitment. Moreover, the stereotype underlying the statute is false; in fact, the large majority of individuals committed to hospitals who, like Appellee, have no arrest record prior to their commitment are no more likely than the general population to misuse firearms after being discharged.

This is not surprising, because commitment is not designed to identify permanently dangerous people. Contrary to the Appellant's suggestion, commitment does not require a finding of imminent dangerousness to others in every case. In fact, a majority of commitments are based either on a finding that the person is so passive as to be harmful to him- or herself or on highly suspect, short-term predictions of imminent dangerousness to self.

Finally, the alleged "administrative convenience" of permanently disqualifying nonviolent formerly committed people, along with a small minority who may be violent, is not a sufficient justification for using this sweeping, overbroad, and stigmatizing classification. The Act distinguishes between less and more dangerous felons by providing the former with an opportunity to apply for removal of their legal disqualification. There is no rational reason, apart from simple prejudice, to provide this opportunity to presumptively less dangerous criminals but not to identifiably less dangerous individuals who at one time were mentally disordered and committed. Point II.



*Amicus* respectfully urges this Court to affirm the judgment of the United States District Court for the District of New Jersey.

### INTRODUCTION

In *amicus*' view, the central issue in this case is Congress' use of false stereotypes to impose a permanent civil disability on formerly mentally disordered people who once were civilly committed to a mental institution.<sup>1</sup> Appellee in this case admitted himself voluntarily to a psychiatric hospital in 1971. When he expressed the in-

<sup>1</sup> Section 922(g)(4) and (h)(4) prohibit any person adjudicated a "mental defective" and any person "who has been committed to any mental institution" from receiving or transporting firearms in interstate commerce. Interestingly, 18 U.S.C. App. § 1202(a)(3) prohibits from possessing firearms a person adjudicated a "mental incompetent," but not mental defectives or persons with a history of commitment. The terms used by these statutes are not synonymous. Mental incompetents are persons adjudicated by the State, for a variety of reasons, to be incapable, permanently or temporarily, of managing their personal and financial affairs. See, e.g., D.C. Code § 21-1501. Mental defectives are persons, such as mentally retarded people, who suffer from a long-term or permanent impairment to their intellectual functioning. See, e.g., D.C. Code §§ 6-1901 *et seq.* Persons committed to mental institutions, as discussed more fully below, are people who are found to be mentally ill and who otherwise meet the standards of state commitment statutes. See, e.g., 21 D.C. Code 501 *et seq.* Although it may be convenient for Appellant to use the phrase "persons with a history of commitment" to refer to all categories of persons described in §§ 922(g)(4) & (h)(4) and § 1202(a)(3), Brief for Appellant at 13, n. 7, it is highly inaccurate and misleading. The statuses are quite distinct. For example, it is well established that some people committed to mental institutions are nevertheless competent to make treatment decisions or other important personal decisions, and some incompetent people do not meet the gravely disabled or dangerousness standards necessary for commitment to an institution. See, e.g., *Rogers v. Commissioner*, 390 Mass. 489, 458 N.E.2d 308 (1983). *People v. Medina*, 705 P.2d 960 (Sup. Ct. Colo. 1985) (en banc), *In re K.K.B.*, 609 P.2d 747 (Sup. Ct. Okla. 1980). See pp. 13-17, *infra*.

tention to leave, he was committed upon application of his physician. With the hospital's consent, he was discharged less than one month after his admission. Nonetheless, because of his brief stay in a psychiatric hospital years ago, he is permanently prohibited from shipping, transporting or receiving firearms. Therefore, this case exemplifies in the most dramatic way the stigma attached to having been once labeled mentally disordered.

*Amicus* does not dispute the plenary power of Congress to control the sale and possession of firearms. But basic constitutional principles of equal protection are offended when, as in the statute at issue, Congress exercises that power based on irrational prejudice against a traditionally shunned, disdained and legally disadvantaged group of people. The district court in this case struck down the statute at issue on these grounds, finding "no rationale for the statute but an archaic, stigmatizing, unreasoning fear of the mentally ill." *Galioto v. Department of Treasury*, 602 F. Supp. 682, 690 (D.N.J. 1985).

Throughout this Nation's history, people suffering from mental disorder, or labeled as such, have been subjected to derision, unequal treatment under the law, segregation, and indefinite confinement.<sup>2</sup> Since the days of Colonial America, their condition has been variously ascribed to moral defect, disease, dereliction or evil spirits, and they have been treated as undesirables, criminals, or both.<sup>3</sup>

<sup>2</sup> See, E. BEIS, *MENTAL HEALTH AND THE LAW* 3-6 (1984); F. BOWE, *HANDICAPPING AMERICA* 3-8 (1978). See generally A. DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES* (2d ed. 1949).

<sup>3</sup> See President's Committee on Employment of the Handicapped, *Disabled Americans: A History*, 27 PERFORMANCE 1-2 (1976-77) (hereafter "*Disabled Americans: A History*"); U.S. COMMISSION ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 18 (September 1983) (hereafter "*ACCOMMODATING THE SPECTRUM*").

In the early 19th century, almost all States encouraged or mandated the confinement of the "insane" in jails or almshouses.<sup>4</sup> The result was the total exclusion of mentally disordered people from society. Most of these facilities were merely custodial and many were unsanitary and overcrowded.<sup>5</sup> By the 1850's, these conditions led reformers to regard mentally disabled people as the unfortunate victims of society, not as delinquents, and to crusade for the improvement of institutional facilities.<sup>6</sup> Efforts such as those by Dorothea Dix resulted in the construction of new state-run asylums for the mentally disordered, with the aim of providing a stable, orderly and healthful environment for their mentally disordered residents.<sup>7</sup>

These therapeutic objectives were defeated, however, by inadequate public funding and a growing demand for segregation of deviants to "protect society." Just like the almshouses before them, asylums became custodial warehouses.<sup>8</sup> Responding to the advent of Social Darwinism and its "survival of the fittest" doctrine, state legislatures also acted to eliminate the evil influence supposedly exercised by mentally disordered people by curbing what was believed to be their propensity for sexual excess and the resulting transmission of genetic and social defects to future generations. The "eugenics move-

<sup>4</sup> A. DEUTSCH, *supra* note 2, at 129.

<sup>5</sup> *Disabled Americans: A History*, *supra* note 3, at 20.

<sup>6</sup> ACCOMMODATING THE SPECTRUM, *supra* note 3, at 19; E. BEIS, *supra* note 2, at 5; R. LUBOVE, *THE PROFESSIONAL ALTRUIST: THE EMERGENCE OF SOCIAL WORK AS A CAREER, 1880-1930* (1965).

<sup>7</sup> See P. BROWN, *THE TRANSFER OF CARE* 27-29 (1985); D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 293-316 (1980); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* xiii (1971).

<sup>8</sup> ACCOMMODATING THE SPECTRUM, *supra* note 3, at 19; P. BROWN, *supra* note 7, at 28.

ment" was born. States restricted the rights of mentally disordered people to marry and authorized their involuntary sterilization, while their extrusion from society continued.<sup>9</sup>

Simultaneously, other repressive state laws categorically disqualified mentally disordered people from exercising their civil rights. For example, many States passed statutes flatly prohibiting mentally disordered persons from voting and permitting adoption of their children without their consent.<sup>10</sup> States also enacted laws preventing mentally disordered people from obtaining licenses to drive or to practice certain professions.<sup>11</sup> By the end of the 1920's, scientists had discredited many of the basic tenets of the eugenics movement. Nevertheless, statutes remained in force that reflected its philosophy that mentally disordered people are a threat to society.

After World War II, the public developed a more humanitarian concern for disabled people, particularly those returning from military service.<sup>12</sup> At the same time, the debilitating effects of rigidly ordered institutional life began to be understood; empirical evidence and clinical studies showed that prolonged stays in institutions warped personalities, reduced cognitive ability and impaired social skills.<sup>13</sup> In response, reformers sought to remove

<sup>9</sup> See Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMPLE L. Q. 997 (1977) (collecting authorities); N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 70 (1971).

<sup>10</sup> See, e.g., ACCOMMODATING THE SPECTRUM, *supra* note 3; S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* (3d ed. 1986). See generally, Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1044 (1979).

<sup>11</sup> S. BRAKEL, J. PARRY & B. WEINER, *supra* note 10.

<sup>12</sup> P. BROWN, *supra* note 7, at 29-32; E. GINZBERG & D. BRAY, *THE UNEDUCATED* 41-42 (1953).

<sup>13</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *THE HOMELESS MENTALLY ILL* (H. Lamb ed. 1985); B. FLINT, *THE CHILD AND THE*



mentally disabled people from institutions and give them the care and services in the community that would allow them to live in society.<sup>14</sup> Congress and many state legislatures have recognized that mentally disordered people are subject to invidious discrimination, passing laws designed to protect them from certain consequences of societal prejudice.<sup>15</sup>

The community mental health and deinstitutionalization movements of the 1960's and 1970's have encountered many obstacles, however, and although most mentally disordered people may no longer be subjected to the egregious mistreatment they suffered earlier in this century, today they suffer as much from abuse, stigmatization, and discrimination.<sup>16</sup> See *Addington v. Texas*, 441 U.S.

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<sup>14</sup> See, e.g., The Mental Retardation Facilities and Community Health Centers Construction Act (Community Mental Health Centers Act), 42 U.S.C. §§ 2681-2687 (repealed).

<sup>15</sup> See, e.g., Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; Education For All Handicapped Children Act, 20 U.S.C. § 1412. Some States have passed laws or constitutional amendments prohibiting certain types of discrimination against the mentally handicapped, such as discrimination in employment and housing. See, e.g., Ohio Rev. Code Ann. § 44-1001 (1981); Iowa Code Ann. §§ 601A.6 and 601A.8 (West 1975 & Supp. 1982-1983); Minn. Stat. Ann. §§ 363.03.1-363.03.2 (West Supp. 1982); N.J. Stat. Ann. § 10.5-4.1 (West Supp. 1982-1983).

<sup>16</sup> Inadequate funding at both the federal and state level, administrative fragmentation, and lack of knowledge concerning effective community service systems have obstructed realization of objectives embodied in these laws. See The President's Comm'n. on Mental Health, *Report to the President*, Vol. 1, pp. 42, 55-57 (1978). See also AMERICAN PSYCHIATRIC ASSOCIATION, *THE HOMELESS MENTALLY ILL* 60-74 (H. Lamb ed. 1984). Most recently, instances of abuse and mistreatment of institutionalized mentally disabled persons were documented in congressional hearings. See generally Joint Hearings on Examining the Issues Related to the Care and

418, 429 (1979). As recognized in 1980 by the Department of Health and Human Services, continued stigma attaching to mental illness is well documented, and public ignorance about mental disorder and fear of its victims is prevalent across the country.<sup>17</sup>

Studies conclude that both the fact of mental hospitalization and the labeling of people as mentally ill stigmatize those so hospitalized and labeled with lasting, negative effects on their lives.<sup>18</sup> Mentally disordered people discharged from hospitals or outpatient treatment programs who are ready and able to resume their lives find

Treatment of the Nation's Institutionalized Mentally Disabled Persons, Before the Subcomm. on the Handicapped of the House Comm. on Labor and Human Resources, and the Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the Comm. on Appropriations, 99th Cong., 1st Sess. (1985).

<sup>17</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STEERING COMMITTEE ON THE CHRONICALLY MENTALLY ILL, TOWARD A NATIONAL PLAN FOR THE CHRONICALLY MENTALLY ILL 2-129 to 2-136 (December 1980).

<sup>18</sup> See, e.g., Rabkin, *Public Attitudes Toward Mental Illness: A Review of the Literature*, 10 SCHIZO. BULL. 9 (1974); Farina & Felner, *Employment Interviewer Reactions to Former Mental Patients*, 82 J. ABNORMAL PSYCHOL. 268 (1973); Farina, Felner & Boudreau, *Reactions of Workers to Male and Female Mental Patient Job Applicants*, 41 J. CONSULTING AND CLINICAL PSYCHOL. 363 (1973); Cuming & Cuming, *On the Stigma of Mental Illness*, 1 COMMUNITY MENTAL HEALTH J. 135 (Summer 1965); see also Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation*, 9 CANADIAN J. BEHAV. SCI. 85 (1977); Baron, *Changing Public Attitudes About the Mentally Ill in the Community*, 32 HOSP. & COMM. PSYCHIAT. 173 (1981); N. BARTEL & S. GUSKIN, A HANDICAP AS A SOCIAL PHENOMENON, *PSYCHOLOGY OF EXCEPTIONAL CHILDREN AND YOUTH* 94 (W. Cruickshank ed. 1981). See also J. GLIEDMAN & W. ROTH, *THE UNEXPECTED MINORITY* 23-24, 30 (1980). One study, which ranked stigma attaching to certain types of disabilities, ranging from the least to the most stigmatizing, ranked mental illness the most stigmatizing of all disabilities, even above criminal record. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295 (1970).



themselves feared, pitied, and patronized. In large part due to this stigma,<sup>19</sup> such ex-patients are often crowded into "psychiatric ghettos,"<sup>20</sup> socially isolated,<sup>21</sup> and unable to secure suitable employment.<sup>22</sup>

The disability imposed by the statute does more than reflect this stigmatization of the formerly mentally disabled. It also perpetuates the false stereotype upon which it is based, giving it undeserved credibility in other contexts.

### ARGUMENT

#### I. BECAUSE PRESENTLY AND FORMERLY MENTALLY DISORDERED PEOPLE SHARE MANY CHARACTERISTICS WITH CLASSIFICATIONS CONSIDERED SUSPECT, THE EQUAL PROTECTION CLAUSE REQUIRES, AT A MINIMUM, THAT THE CLASSIFICATION ACTUALLY FURTHER THE PURPOSES OF THE ACT.

This Court has not decided whether governmental discrimination based on mental *disorder* or former mental disorder is "suspect" or "semi-suspect" and therefore

<sup>19</sup> The stigmatized person is one who "possesses a trait which makes him different from normals [and] which separates him from the rest of society." E. GOFFMAN, *STIGMA: NOTES OF THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963).

<sup>20</sup> See, e.g., Lamb & Guertzel, *Discharged Mental Patients: Are They Really in the Community?* 24 ARCH. GEN. PSYCHIAT. 29 (1971); Mor, Sherwood & Gutkin, *Psychiatric History as a Barrier to Residential Care*, 35 HOSP. & COMM. PSYCHIAT. 368 (1984).

<sup>21</sup> S. SEGEL & V. AVIRAM, *THE MENTALLY ILL IN COMMUNITY-BASED SHELTERED CARE: A STUDY OF COMMUNITY CARE AND SOCIAL ISOLATION* (1977). See also Kanter, *Recent Zoning Cases Uphold Establishment of Group Homes for the Mentally Disabled*, 18 CLEARINGHOUSE REV. 515 (Oct. 1984) (efforts to establish housing alternatives for mentally disabled people are often thwarted by local zoning laws or restrictive covenants).

<sup>22</sup> Farina & Felner, *supra* note 18; Farina, Felner & Boudreau, *supra* note 18; Wolfe, *How the Disabled Fare in the Labor Market*, MONTHLY LABOR REV. 50-51 (1980).

subject to heightened judicial scrutiny.<sup>23</sup> See *Schweicker v. Wilson*, 450 U.S. 221, 229 n.13 (1981). In *City of Cleburne v. Cleburne Living Center*, — U.S. —, 87 L. Ed. 2d 313, 324 (1985), this Court held that mental *retardation* does not constitute a suspect classification that, when used by government to deny benefits or impose burdens on citizens, must be submitted to strict judicial scrutiny. However, the *Cleburne* Court carefully analyzed the asserted purposes and effects of zoning restrictions that discriminated against mentally retarded people, and found that the restrictions were based on "irrational prejudice against the mentally retarded," and therefore were unconstitutional. *Id.* at 327.

Similarly, the Court need not hold that the mentally disordered are a suspect class to decide this case. Yet it is surely aware, in light of the history of isolation, prejudice, and stigma reviewed above, that citizens affected by this statute constitute a stigmatized and traditionally powerless minority sharing many of the characteristics the Court has indicated require a statute to satisfy a higher standard of legitimacy.<sup>24</sup> *Plyler v. Doe*, 457 U.S. 202, 216-218, & n.14 (1982); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). "Mental disorder" is a term used to denote a number of involuntarily acquired mental conditions that have long been misunderstood, greatly feared, and often regarded—inaccurately—as permanent. Although in many cases mental disorder does abate, it is an involuntarily acquired status over which the individual has little or no control. Furthermore, as discussed earlier, like other

<sup>23</sup> As used in this brief, the term "mental disorder" includes persons sometimes referred to as mentally ill, insane, lunatics, deranged, or crazy. It does *not* include people with a low level of intellectual functioning sometimes referred to as mentally retarded, idiots, imbeciles, incompetents, and mental defectives.

<sup>24</sup> See Note, *Mental Illness: A Suspect Classification?* 83 YALE L. J. 1237 (1974).

groups who have been found entitled to heightened scrutiny, people afflicted with mental disorder are an insular minority that has been subject to a long, continuing history of prejudice and stigma. After hospitalization or treatment in the community, many formerly mentally disordered people find they are isolated from others in their pursuit of employment, education, living arrangements, and social outlets.

Although *amicus* believes that heightened scrutiny of the classification at issue would be appropriate, it is unnecessary for this Court to reach that issue in this case. Like mentally retarded people, the class harmed by the statute has been subjected throughout our history to a "tradition of disfavor." See *City of Cleburne v. Cleburne Living Center*, 87 L. Ed. 2d at 328-29 (Stevens, J., concurring). As in *City of Cleburne* and as demonstrated in Point II, *infra*, careful analysis under the rational basis test reveals that the statute's denial to Appellee of rights afforded to others "rest[s] on an irrational prejudice" against persons formerly committed to mental institutions. 87 L. Ed. 2d at 327 (majority opinion). See *Plyler v. Doe*, 457 U.S. at 223. As applied to Appellee and others similarly situated, the statute is not a rational way to achieve the statute's legitimate purpose.

## II. THE STATUTE IRRATIONALLY DISCRIMINATES AGAINST APPELLEE ON THE BASIS OF FORMER MENTAL DISORDER AND COMMITMENT.

### A. The Sole Asserted Purpose Of The Statute Is To Prevent Misuse Of Firearms By Persons Who Are Especially Dangerous.

The Appellant seeks to justify the statute's permanent disqualification of people who have formerly been committed to a mental institution solely on the basis that the disqualification keeps firearms away from people who are particularly dangerous. Brief of Appellant at 7; see, e.g., *Lewis v. United States*, 445 U.S. 55, 64 (1980).

Other purposes, such as punishment, might be advanced as justifying *other* disqualifications contained in the Act.<sup>25</sup> But formerly committed people acquire involuntarily the status resulting in their disqualification; that status is in no respect blameworthy, illegal, or immoral. Congress therefore cannot be presumed to have intended to punish formerly mentally disordered people. Cf. *Plyler v. Doe*, 457 U.S. at 240 (Powell, J., concurring); *Robinson v. California*, 370 U.S. 660 (1962). Accordingly, the statute's prohibition may be justified—if at all—only as a preventative measure.

### B. The Statute's Permanent Disqualification Of Formerly Committed People Is Irrational Because The Commitment Decision Is At Most Based On Unreliable Predictions Of Short-Term Dangerousness.

One of the most persistent stereotypes of mentally disordered people is that they are dangerous persons against whom society must defend itself. As demonstrated below, with respect to the large identifiable majority of those formerly committed to institutions to which Appellee belongs, this stereotype is simply wrong; this identifiable majority is no more likely to commit violent acts than is the population-at-large. And the minority that can be identified as more likely to act violently following discharge is nevertheless no more likely to be violent than are demographically similar people who have *not* been committed. This lack of correlation between commitment and violence results, in part, from the fact that the commitment process is not designed to identify a

<sup>25</sup> The groups Congress selected included juveniles, persons under indictment, fugitives from justice, substance abusers, persons dishonorably discharged from the military, persons who have renounced citizenship, certain felons, mental incompetents, mental defectives, and people who have been committed to mental institutions. 18 U.S.C. §§ 922(g) & (h) § 1202(a). Many of the classifications not here at issue are composed of people who have acquired their status by voluntarily engaging in acts Congress might have considered illegal, immoral, or otherwise blameworthy.



group of people found to have a permanent proclivity for dangerous behavior.

1. *Many commitments are based not on dangerousness but on passivity and neglect of a person's own physical needs.* A great many commitments are not based on findings of dangerousness at all.<sup>26</sup> Notwithstanding Appellant's brief to the contrary, this Court has never determined whether the Constitution requires a finding of dangerousness before a State may commit a mentally disordered person.<sup>27</sup> More than two-thirds of the States authorize commitment of a person who is gravely disabled without a finding that the person poses a risk of immediate danger.<sup>28</sup> Gravely disabled people are those whose well-being is threatened by their passivity and

<sup>26</sup> Monahan, Ruggiero & Friedlander, *Stone-Roth Model of Civil Commitment and the California Dangerousness Standard*, 39 ARCH. GEN. PSYCHIAT. 1267, 1268-1271 (1982). As discussed in note 1, *supra*, commitment should not be confused with a determination of incompetence, which in most States is based on a finding that a person is incapable of managing his or her personal and/or financial affairs.

<sup>27</sup> Brief for Appellant at 9, 19. In *O'Connor v. Donaldson*, 422 U.S. 563 (1974), the Court held only that a nondangerous person could not be confined without treatment if he or she could survive in the community with the assistance of family or friends. The Court stated "[s]pecifically, there is no reason now to decide . . . whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." 422 U.S. at 573. In *Addington v. Texas*, 441 U.S. 418, 431 (1978), the Court held only that the varying substantive standards for involuntary commitment established by the State must be proved by clear and convincing evidence and not by a mere preponderance of the evidence. The Court noted that the Appellant there had challenged the constitutionality of the Texas standards of commitment in the Texas courts, but that "no challenge to the constitutionality of any Texas statute was presented" in this Court. *Id.* at 422.

<sup>28</sup> See Appendix A to this brief. See also E. BEIS, *supra* note 2, at 297-322.

neglect of their own personal needs (food, shelter, and clothing), hygiene, and safety.

Although the number varies from institution to institution, up to 30 percent of all commitments are based on a finding that the person is gravely disabled, and 55-63 percent of all commitments are not associated with dangerousness to others at all.<sup>29</sup> Because of their passivity, people institutionalized by such commitments are very unlikely to use guns aggressively against themselves or others even during a period of mental incapacity.

2. *Commitments premised on dangerousness are usually based on unreliable predictions of future behavior.* Commitments that are based on a determination of dangerousness to others need not be based on proof of past dangerous acts.<sup>30</sup> Instead, they are usually based on predictions of dangerousness made by mental health professionals—predictions that the Appellant in this case, the Court, the American Psychiatric Association, and a Task Force organized by *amicus* APA agree are highly unreliable.<sup>31</sup> In fact, such predictions are believed to be right *at best* only one-third of the time, and greatly to

<sup>29</sup> See, e.g., Monahan, Ruggiero & Friedlander, *supra* note 26, at 1267-1271.

<sup>30</sup> Rossi, Jacobs, Monteleone, Olsen, Surber, Winkler & Wommack, *Violent or Fear-Inducing Behavior Associated with Hospital Admission*, 36 HOSP. & COMM. PSYCHIAT. 643, 645-46 (1985) [hereafter Rossi, Jacobs, *et al.*].

<sup>31</sup> *Estelle v. Smith*, 451 U.S. 454, 473 (1981); *Barefoot v. Estelle*, 463 U.S. 880, 889, n.7 (1983); *id.* at 921, n.2 (Blackmun, J., dissenting); Brief of Appellant 11-12; American Psychiatric Association Task Force Report, *Clinical Aspects of the Violent Individual* 28 (1974) (90 per cent error rate "unfortunately . . . is the state of the art"); *Report of the American Psychological Association Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOL. 1099 (1978) [hereafter "APA Report"]. See generally,



over-predict dangerousness.<sup>32</sup> Given the low accuracy level of such predictions of dangerousness, we can safely assume, and the empirical data confirm, that the overwhelming majority of committed patients were not dangerous at the time they are committed.

Further, commitment to a mental institution is based on predictions of dangerousness in the near future. Experts agree that predictions become less reliable the farther into the future they are projected. See *Barefoot v. Estelle*, 463 U.S. at 920 (Blackmun, J., dissenting) (collecting authorities).<sup>33</sup> The laws of almost every State, if not the Constitution, require that involuntarily committed mental patients be periodically re-evaluated to determine whether they continue to satisfy the criteria for commitment.<sup>34</sup> An original determination of dangerousness is

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Steadman, *Predicting Dangerousness Among the Mentally Ill*, 6 *INTERN. J. L. PSYCHOL.* 381-390 (1983).

<sup>32</sup> *Barefoot v. Estelle*, 463 U.S. at 920, 922 (Blackmun, J., dissenting); J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR*, 21-39, 47-49, 86 (1981); Brief of the American Psychiatric Association *Amicus Curiae*, *Barefoot v. Estelle*, No. 82-6080, 9, 13 (U.S. 1983); APA Report, *supra* note 31, at 1110; Diamond, *The Psychiatric Prediction of Dangerousness*, 123 *U. PA. L. REV.* 439, 447-50 (1974); B. ENNIS & R. EMERY, *THE RIGHTS OF MENTAL PATIENTS* 20 (1978). See generally Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 *S. CAL. L. REV.* 598-600 (1978). R. WETTSTEIN, *THE PREDICTION OF VIOLENT BEHAVIOR AND THE DUTY TO PROTECT THIRD PARTIES* (1981).

<sup>33</sup> See, e.g., J. MONAHAN, *supra* note 32, at 6-7, 47-49.

<sup>34</sup> See Appendix B to this Brief. See, e.g., *Dixon v. Attorney General of Pennsylvania*, 325 F. Supp. 966 (N.D. Pa. 1971) (due process clause requires that no commitment order may exceed six months); *Fasulo v. Arafah*, 378 A.2d 553 (Conn. 1977) (automatic judicial review required under Connecticut Constitution's due process clause); *State v. Fields*, 390 A.2d 574 (N.J. 1978) (automatic judicial review of civil commitment orders required under equal protection clause).

not considered sufficient to support long-term hospitalization. In fact, long-term commitment is the exception rather than the rule. The median length of stay for a person civilly committed to a mental hospital in 1980 was no longer than 25 days.<sup>35</sup>

3. *People who, like Appellee, have been released after commitment have been specifically determined not likely to be dangerous.* The unreasonableness of a permanent disability based on commitment is compounded by the fact that people committed to mental hospitals on the basis of dangerousness are released only upon a specific finding that they are *not* dangerous to themselves or to others. The effect of the statute is thus to credit and elevate to a status of permanence an initial finding of temporary dangerousness—when dangerousness was in fact the basis for commitment—while ignoring a later finding that this temporary condition no longer prevails. It is irrational to dismiss the later prediction as unreliable, as the Appellant does, while defending the statute on the basis of the earlier prediction. It is unreasonable to base a long-term, indeed permanent, civil disability on a commitment decision that may or may not be based on a finding of short-term dangerousness and then to disregard a subsequent finding of nondangerousness.<sup>36</sup>

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<sup>35</sup> Division of Biometry and Applied Sciences, The National Institute of Mental Health, Unpublished Data (1980) [available from The Survey and Reports Branch] [hereafter NIMH, Unpublished Data].

<sup>36</sup> The significance that rationally can be attached to the fact of commitment is further minimized by the lack of a practical distinction in many cases between commitment and voluntary admission. Many people admitted to mental hospitals, particularly those admitted repeatedly and familiar with the system, prefer to "volunteer themselves in" when they are threatened with commitment. This enables them to sign themselves out when they are ready to leave. Yet, by and large such individuals suffer from the same disabilities and present the same risks as people who refuse to become voluntary patients, and consequently are civilly committed. See generally, Rossi, Jacobs, *et al.*, *supra* note 30.

**C. No State Or Other Federal Statute Of Which *Amicus* Is Aware Imposes A Permanent, Unreviewable Disability Solely On The Basis Of A History Of Mental Disorder Or Commitment To A Mental Institution.**

Although all States deny some civil rights to mentally disordered people, they deny such rights only to people whose mental functioning and exercise of those rights are *currently* impaired by their disorder. *Amicus* is aware of no State that, in granting licenses to drive, marry, practice a profession, possess firearms or for any other purpose, uses a history of commitment to a mental institution as a criterion for permanent, unreviewable disqualification.

Thirty-one States and the District of Columbia currently restrict the sale of firearms to, or possession of firearms by, people with mental disabilities.<sup>37</sup> But *not one* makes a history of hospitalization sufficient for the automatic, permanent denial of a license. Most States deny licenses only upon evidence of current mental illness or evidence that the applicant is a patient in a mental hospital at the time of the sale or the application for the license.<sup>38</sup> Only eight States even inquire whether the applicant has previously been hospitalized.<sup>39</sup> All but two of these will nonetheless grant a license to someone who has been hospitalized upon a showing that the person has

<sup>37</sup> For identification and a compilation of the relevant statutes in these States, see Appendix B of Brief *Amicus Curiae* of The Coalition for the Fundamental Rights and Equality of Ex-Patients.

<sup>38</sup> *E.g.* Cal. Welf. Inst. Code § 8100 (West 1984) (possession prohibited for a person who is currently a patient in a mental hospital); Ark. Stat. Ann. § 41-3103(b) (Supp. 1983) (possession prohibited for person adjudicated mentally defective).

<sup>39</sup> See Del. Code Ann. tit. 11 § 1448 (1983); D.C. Code § 6-2313(6) (1973 & Supp. 1978); Ga. Code Ann. § 16-11-129(b)(4) (1980 & Supp. 1981); Ill. Stat. Ann. tit. 38 § 83-8(e) (Smith-Hurd Supp. 1984); Me. Rev. Stat. Ann. tit. 25 § 2032(C)(6)(e); Mass. Gen. Laws Ann. ch. 140 § 129(B)(b) (Michie Supp. 1985); N.J. Stat. Ann. § 2c:58-3(c)(3); R.I. Gen. Laws § 11-47-6 (1984).

recovered,<sup>40</sup> that the disability will not affect firearm possession,<sup>41</sup> or that the circumstances surrounding the hospitalization are not sufficient to deny the license.<sup>42</sup> The remaining two States do not impose an automatic, permanent disqualification like that imposed by the statute.<sup>43</sup>

The same pattern pertains at the state level in another area equally important to public safety, licensing to drive a motor vehicle. In granting licenses to drive, 46 States and the District of Columbia<sup>44</sup> have enacted legislation that expressly disqualifies people who are mentally disabled and unable to drive,<sup>45</sup> adjudicated disabled and not restored to health,<sup>46</sup> currently institutionalized,<sup>47</sup> or certi-

<sup>40</sup> Del. Code Ann. tit. 11 § 1448 (1983); D.C. Code tit. 6 § 6-2313(6) (1973 & Supp. 1978); N.J. Stat. Ann. § 2C:58-3(c)(3); R.I. Gen. Laws tit. 11, ch. 47 § 11-47-6 (1984).

<sup>41</sup> Mass. Gen. Laws Ann. ch. 140 § 129(B)(b).

<sup>42</sup> Ga. Code Ann. § 16-11-129(b)(4).

<sup>43</sup> Maine's application for a firearms permit asks if the person has ever been committed to a mental institution but does not require that the application be denied if the answer is in the affirmative. See Me. Rev. Stat. Ann. tit. 25 § 2032(C)(6)(e). Illinois prohibits issuance of a firearm owners's identification card to people who have been patients within the last five years. Ill. Stat. Ann. tit. 38, § 83-8(c).

<sup>44</sup> See Appendix C. See also S. BRAKEL, J. PARRY & B. WEINER, *supra* note 10, at 443-44, Table 8.3.

<sup>45</sup> See Appendix C (citing statutes of Alabama, Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wyoming).

<sup>46</sup> See Appendix C (citing statutes of Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming).

<sup>47</sup> *E.g.*, statutes of Nebraska, New York and Oregon, cited in Appendix C.



fied by an institution's superintendent as unable to drive.<sup>48</sup> Each statute refers only to the individual's *current* mental state. Not one prohibits a person from driving because of a mere *history* of mental disorder or past commitment to a mental institution. The American Bar Association's Commission on the Mentally Disabled has proposed that the granting of driver's licenses should be based solely on a functional ability to drive, and that such determinations should be made individually according to established procedures and should provide each person a meaningful opportunity to challenge adverse determinations in administrative hearings.<sup>49</sup>

Similarly, every State limits occupational licensing of mentally disabled persons, but only while the affected professionals are having mental problems, and even then only if their mental condition renders practice of their profession unsafe.<sup>50</sup> Most States prohibit certain classes of mentally disabled persons from exercising their right to vote,<sup>51</sup> but, again, none disenfranchises voters solely on

<sup>48</sup> *E.g.*, statutes of Wisconsin, cited in Appendix A.

<sup>49</sup> B. SALES, D. POWELL, R. VAN DUIZEND, 1 DISABLED PERSONS AND THE LAW 132-42 (1982).

<sup>50</sup> Many state laws permit denial, suspension or revocation of a license on the grounds of mental impairment at the discretion of a professional board. *E.g.*, Mont. Code Ann. § 37-15-321(1) (1981). Some States, however, provide for mandatory suspension of licenses of mentally disabled health care professionals, but *only* during their period of incapacity. *E.g.*, Ga. Code § 84-916(a) (12) (Supp. 1981); Colo. Rev. Stat. § 12-38-119(1) (Supp. 1980). Others place members of certain professions on probation during a period of mental instability. *E.g.*, Cal. Bus. and Prof. Code § 2947 (West 1974 and Supp. 1983) (podiatrists); Colo. Rev. Stat. § 12-36-118 (1978 and Supp. 1982) (physicians); Del. Code Ann. tit. 24, § 1741(a) (7) (1981 and Supp. 1982) (medical doctors or osteopaths); N.C. Gen. Stat. § 90-41(a) (7) (1981 and Supp. 1981) (dentists).

<sup>51</sup> Twenty-four states deny voting rights to "idiots," "insane persons," "mentally incompetent persons," or those of "unsound mind." (See Appendix D-1. Sixteen states and the District of Columbia disqualify only people who are formally adjudicated incompetent or

the basis of a *history* of disorder or commitment.<sup>52</sup> The law has long required sufficient mental capacity to give consent as a necessary condition for a valid marriage, and many States prohibit people suffering from a current mental disability from marrying.<sup>53</sup> No State, however, prohibits a person from marrying based merely on a history of mental illness or institutionalization.

At the federal level, *amicus* is aware of no law, other than this Act, that imposes an automatic, permanent disability on people solely on the basis of commitment to a mental institution. The statute is out of step with state

placed under guardianship and two states, Maryland and Missouri, do not allow institutionalized persons to vote (see Appendix D-2).

<sup>52</sup> See Note, *Mental Disability and the Right to Vote*, 88 YALE L. J. 1644 (1979). Colorado, for example, specifically provides that "[n]o person confined in a state institution for the mentally ill shall lose his right to vote because of such confinement." Colo. Rev. Stat., 1-2-103(5) (1980). In fact, several States have recently decided that there is no necessary relationship between mental disability and rational exercise of the right to vote and therefore do not restrict in any way the voting rights of mentally disordered people. These States include Colorado, Illinois, Indiana, Kansas, Michigan, New Hampshire, North Carolina, Pennsylvania and Tennessee.

<sup>53</sup> See, Annot., 82 A.L.R. 2d 1040 (1962) and Later Case Service (1979 and Supp. 1982). They do so by disqualifying persons loosely and archaically termed "idiots," "lunatics," and "imbeciles" from entering a valid marriage. *E.g.*, Cal. Civ. Code § 4201 (West 1970 and Supp. 1981); D.C. Code Ann. § 30-103 (1981 and Supp. 1982). A number of States, however, have recently improved their statutes by using more definite and modern terms and now prohibit marriages only of persons "adjudged incompetent," *e.g.*, N.J. Stat. Ann. § 37:1-9 (1968 and Supp. 1982); Ky. Rev. Stat. Ann. § 402.020(1) (Michie 1972 and Supp. 1980), or "under guardianship," *e.g.*, Conn. Gen. Stat. Ann. § 46b-29 (West 1978 and Supp. 1981) (written consent of guardian will permit marriage to go forward); Minn. Stat. Ann. § 517.03 (West 1969 and Supp. 1981) (written consent of commissioner of public welfare will permit marriage to go forward), or currently institutionalized, *e.g.*, Del. Code Ann. tit. 13, § 101(b) (2) (1981); Mass. Ann. Laws tit. 207, § 5 (Michie 1981 and Supp. 1981).



and other federal legislation. It is out of step for a reason: It is based solely on irrational prejudice against mentally disabled people.

**D. As Applied To Appellee And Others With No History Of Arrest Prior To Commitment, The Statute Does Not Prevent Firearms Abuse Because Such People Are No More Likely Than The General Population To Commit Violent Acts.**

In *City of Cleburne*, the Court ruled unconstitutional a municipal zoning ordinance requiring group homes for the mentally retarded to obtain a special use permit, but it did so only in the circumstances of that case. 87 L. Ed. 2d 325.<sup>54</sup> Similarly, because, as demonstrated below, Appellee is a member of an identifiable majority of persons legally disabled by the statute as to whom the statute serves no rational purpose, the Court should affirm the decision of the district court and rule that the statute is unconstitutional as to Appellee and others similarly circumstanced.

Studies show that the best predictor of arrest for violent crimes is prior history of arrests, whether the population measured is the general public, prisoners, or discharged mental patients.<sup>55</sup> Thus, studies of discharged

<sup>54</sup> This Court has recently held that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 86 L.Ed.2d 394, 405 (1985). See *United States v. Grace*, 461 U.S. 171 (1983) (law prohibiting demonstrations on Supreme Court grounds invalidated only as applied to picketing on public sidewalks); *NAACP v. Button*, 371 U.S. 415 (1963) (State's rules against solicitation by attorneys invalidated only as applied to activities of the NAACP in that case); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state breach of the peace ordinance invalidated only as applied to prevent peaceful distribution of literature).

<sup>55</sup> Cohen, *Crime Among Mental Patients—A Critical Analysis*, 52 PSYCHIAT. Q. 100, 104-105 (1980); Ribner & Steadman, *Recidivism Among Offenders and Ex-Mental Patients: A Comparative Analysis*, 19 CRIMINOL. 411, 418 (1981). See Steadman & Felson, *Self-Reports*

mental patients show that people who were offenders before they entered a mental hospital tended to continue to offend after they were discharged. But patients who, like Appellee, had no arrest record before hospitalization were extremely unlikely to be arrested after discharge.<sup>56</sup> Consistent with this expectation, nothing in the record suggests that, in more than a decade since his discharge, Appellee has ever been arrested or acted violently.<sup>57</sup>

*of Violence*, 22 CRIMINOL. 321, 329-333 (1984); J. MONAHAN & H. STEADMAN, *Crime and Mental Disorder: An Epidemiological Approach*, reprinted in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145-188 (M. Tonry & N. Morris eds. 1983); Steadman, Coccozza & Melick, *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals*, 135 AM. PSYCHIAT. J. 816, 818 (1978). The FBI reports nationwide arrests for "index crimes" in general (murder, manslaughter, forcible rape, robbery, aggravated assault, larceny-theft, motor vehicle theft, and arson) and for "violent index crimes" in particular (murder, forcible rape, robbery, and aggravated assault). U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1984 1, 41 (Table 1, n.4), 172-173 (1985) [hereafter U.S. DEPARTMENT OF JUSTICE]. The research discussed in this brief which used arrest data as a measure of dangerousness relies almost entirely on data of arrest for violent index crimes reported by the FBI and regards such data as an indicator of the incidence of actual criminal behavior in the United States. See generally J. WILSON & R. HERRNSTEIN, *CRIME & HUMAN NATURE* ch. 3-7 (1985); Tardiff & Koenigsberg, *Assaultive Behavior Among Psychiatric Outpatients*, 142 AM. J. PSYCHOL. 960, 962 (1985). Although such data cannot capture all true criminal behavior, *amicus* believes they are the best readily available data that can be used as a basis for assessing the proclivity of a group to engage in violent or threatening behavior. J. WILSON & R. HERRNSTEIN, *supra*, at 26-40; J. MONAHAN & H. STEADMAN, *supra*, at 150; Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIAT. 593, 594 (1985) [hereafter Teplin 1985].

<sup>56</sup> Steadman, Coccozza & Melick, *supra* note 55, Table 2 at 818 (19 month follow-up study of state-wide sample of patients discharged from New York State psychiatric facilities). See also J. MONAHAN & H. STEADMAN, *supra* note 55, at 157-58.

<sup>57</sup> The overriding importance of prior arrest as a predictor becomes clear when the 1975 annual post-release arrest rate for the

Research based on samples of men and women in the entire New York State mental health system demonstrates that 75 percent of persons released from mental hospitals entered without a prior arrest record. That large majority was found *less likely* to commit violent crimes after release than the general population.<sup>58</sup> Studies of other mental hospital populations report the same phenomenon.<sup>59</sup> The identifiable majority—of which Appellee is a member—of the disqualified class therefore appears no more likely to misuse firearms than the general public.

Mental disorder and commitment are extremely poor predictors of future violence. Before 1965, the entire group of persons discharged from mental institutions had a lower annual arrest rate for violent crime than the

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group of 98.50/1,000 is broken down. Those with no prior arrests had a rate of 22.06/1000; with one prior arrest, 138.00/1000; with multiple prior arrests, 413.50/1000. See J. MONAHAN & H. STEADMAN, *supra* note 55, at Table 3.

<sup>58</sup> *Id.* The annual arrest rate for all felonies for the 75 per cent of the New York patients released in 1975 who had no police records before admission (22.06/1,000) was actually lower than that of the general New York State population (32.51/1,000). Their annual arrest rate for violent crimes (murder, manslaughter, and assault), 2.2/1000, is also lower than the general population's rate of 3.6/1000. Thus, for arrests for both violent and nonviolent crimes, non-arrested discharged persons' rate is only about two-thirds that of the general population. Patients with one prior arrest had a subsequent annual arrest rate that was about the same as that for the general population, and those with multiple prior arrests had a rate about twenty times as great. J. MONAHAN & H. STEADMAN, *supra* note 55, at 158.

<sup>59</sup> See, e.g., Cohen, *supra* note 55, at 104; Cohen & Freeman, *How Dangerous To The Community Are State Hospital Patients?* 9 CONN. STATE MED. J. 697 (1945); Brill & Malzberg, *Statistical Report On the Arrest Record of Male Expatients, Age 16 and Over Released From N.Y. State Mental Hospitals During the Period 1946-1948*, MENTAL HOSP. SERVICES SUPP. R. 135 (1954); Steadman & Felson, *supra* note 55, at 321-323; Teplin 1985, *supra* note 55, at 593-94, 596-97; Rabkin, *supra* note 18, at 1, 12-27; Pollock, *Is the Paroled Patient a Menace to the Community?* 12 PSYCHIAT. Q. 236 (1938).

general population.<sup>60</sup> Since then, the post-release arrest rate for the group as a whole has increased, exceeding the rate for the population-at-large.<sup>61</sup> This increase in post-release arrest rate coincides with an increase in the committed population of individuals who have demographic characteristics that are associated with higher rates of violence regardless of their mental status or whether they have been committed, i.e., young males with prior arrest records.<sup>62</sup> Controlling for these demographic characteris-

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<sup>60</sup> Ashley, *Outcome of 1,000 Cases Paroled from the Middletown State Homeopathic Hospital*, 8 STATE HOSP. Q. 64-70 (1922); Pollock, *supra* note 59, at 236-244; Cohen & Freeman, *supra* note 59, at 697-700; Brill & Malzberg, *supra* note 59; Rapoport & Lassen, *Dangerousness-Arrest Rate Comparisons of Discharged Patients and the General Population*, 121 AM. J. PSYCHIAT. 776-783 (1965).

<sup>61</sup> See Giovannoni & Gurel, *Socially Disruptive Behavior of Ex-Mental Patients*, 17 ARCH. GEN. PSYCHIAT. 146-153 (1967); Zitrin, Hardesty, Burdock & Drossman, *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCHIAT. 142, 142-44 (1976); Durbin, Pasewark & Albers, *Criminality and Mental Illness: A Study of Arrest Rates in a Rural State*, 134 AM. J. PSYCHIAT. 80-83 (1977).

Almost all studies of the connection between admission or commitment to a mental hospital and subsequent violence are based on the populations of state and county hospitals. Psychiatric patients in private and general hospitals have not been studied. Available statistical information indicates that these populations are older, more female, and have substantially shorter lengths of stay than those of state and county institutions, and therefore probably have substantially lower subsequent arrest rates. See NIMH, *MENTAL HEALTH, UNITED STATES 1985* 50-53 (1985).

Studies that deal with all mental hospital admissions consider a larger population than the "committed" population. Nevertheless, conclusions about the committed population still may validly be drawn from them. First, involuntary commitments now comprise 60 per cent of all admissions. NIMH, *Unpublished Data*, *supra* note 35. Second, as discussed *supra* note 36, the distinction between "voluntary" admissions and commitment is often purely a matter of form.

<sup>62</sup> Steadman, Monahan, Duffee, Hartstone & Robbins, *The Impact of State Mental Hospital Deinstitutionalization on United States*



tics, discharged people still have subsequent arrest rates no higher than the general population; that is, the committed group would be no more violent than a randomly selected, comparably young, male, and previously arrested group that had never been committed.<sup>63</sup> As noted, dis-

*Prison Populations 1968-1975*, 75 J. CRIM. L. & CRIMINOLOGY 474 (1984); J. MONAHAN & H. STEADMAN, *supra* note 55, at 155-60.

This increase necessarily raises the arrest rate for the committed population as a whole. National statistics show that 50 percent of the people arrested for violent crime are under the age of 25 and 80 percent are under the age of 35, U.S. DEPARTMENT OF JUSTICE, *supra* note 55, at 172-173; yet only 39 percent of the general population is under the age of 25 and 56 percent under the age of 35. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1980); U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1984). The arrest rate for violent crime for persons 15 to 19 years old was three times the rate for the general population and twice as high as the rate for people aged 25 to 29, J. WILSON & R. HERRNSTEIN, *supra* note 55, at 128-129. Ninety percent of those arrested for violent crimes are men, U.S. DEPARTMENT OF JUSTICE, *supra* note 55, at 179, while they comprise only about half of the general population. J. WILSON & R. HERRNSTEIN, *supra* note 55, at 108. Women accounted for only 7.85 per cent of all arrests for weapons violations. Steffensmeier & McCobb, *Sex Differences in Urban Arrest Patterns, 1934-79*, 29 SOC. PROBS. 41 (1981).

<sup>63</sup> See, e.g., J. MONAHAN & H. STEADMAN, *supra* note 55, at 181-82; Steadman, Coccozza & Melick, *supra* note 55, at 816-820; Teplin 1985, *supra* note 55, at 593-599; Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate Of The Mentally Ill*, 39 AM. PSYCHOL. 794, 798-801 (1984). These arrest rate results were confirmed by self-report studies and observation reports. See, e.g. Teplin 1985, *supra* note 55, at 593; Rossi, Jacobs, et al., *supra* note 30.

The population of mental hospitals now over-represents young males and people with a history of prior arrests. National statistics show that 60 percent of all involuntary admissions are of males, of whom an increasing number—more than 50 percent in some hospitals—have a history of prior arrest, while at the most about 25 percent of the males in the general population has a history of arrest. Compare Steadman, Monahan, Duffee, Hartstone & Robbins, *supra* note 62, and 474-490, Tables 1 and 4, with Blumstein & Graddy, *Prevalence and Recidivism in Index Arrests: A Feedback*

charged people who have no arrest record—the majority—are, if different at all, less violent than the general population.

Indeed, research on criminal recidivism in this area indicates that

[t]he correlates of crime among the mentally ill appear to be the same demographic and life history factors that are the correlates of crime among any other group. Likewise, the correlates of mental disorder among criminals appear to be the same things that correlate with mental disorder in the general population. . . . When research does control for demographic and life history factors, no relation [between criminality and mental illness] or at best a much weaker relation is found.<sup>64</sup>

The stereotype underlying the challenged classification is therefore demonstrably false: The mentally disordered are not more dangerous than other demographically similar people.

Thus, for Appellee and the vast majority of persons discharged from mental institutions, the assumption inherent in the statute's prohibition, that they are especially likely to misuse guns, is false. Moreover, those within the classification who are likely to misuse guns can be more accurately identified by their history of prior violent acts, as measured by prior arrests or other criteria. At least as to Appellee and others similarly situated, the law's prohibition does not rationally further its purpose of keeping guns away from people who are particularly likely to misuse them. It is based on inaccurate stereotypes, and is therefore unconstitutional. See *City of Cleburne*, *supra*; *Plyler v. Doe*, 457 U.S. 202 (1982); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

*Model*, 16 L. & SOC. REV. 265, 287 (1981-82). About 60 percent of all involuntarily committed people are men. NIMH, Unpublished Data, *supra* note 35.

<sup>64</sup> J. MONAHAN & H. STEADMAN, *supra* note 55, at 152. See Tardiff & Koenigsberg, *supra* note 55.



**E. Administrative Convenience Alone Does Not Constitutionally Justify Permanent Disqualification Under An Overbroad Classification Based On False, Stigmatizing Stereotypes.**

For several reasons, the irrationality of the statute's discrimination is not altered by any claim that the overbroad classification more conveniently identifies the minority of formerly committed people who are likely to be dangerous than would more accurate criteria or procedures. The overbreadth of the classification at issue is extreme. A large majority no more violent than the general population is swept up with the few who may be prone to violence. Second, the nonviolent majority could be readily separated from the potentially more violent minority by using such objective and rationally related characteristics as youth and a prior history of violence. Third, because mental disorder does not correlate with a propensity to be violent, the fact of prior commitment would add little or nothing to other characteristics of an individual—prior arrest history, age, sex, etc.—in determining the likelihood of violent behavior. See *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 537-38 (1973) (lack of biological relationship between food stamp applicants added nothing to likelihood applicants would fraudulently misrepresent their income, and classification based on this lack was therefore without rational basis).

Finally, review of the overall structure of the Act reveals that Congress had no such goal as administrative convenience in mind when it denied to formerly committed people with no history of prior violence the opportunity to remove the disqualification. Congress disdained its supposed interest in administrative convenience when, in § 925, it allowed a subgroup of *felons* to apply to the Secretary of the Treasury for relief from their disqualification. Congress apparently recognized that felons without a prior history of abusing weapons may present a lower risk of future abuse, and afforded them the prospect of administrative relief. But, like this group of

former felons, formerly committed people with no history of violence present a dramatically lower risk—a risk, in fact, no greater than that posed by the general population. Congress could not rationally have decided that a procedure not too dear for criminals without a history of abusing weapons is too expensive for the nonviolent people who have been committed to and released from mental institutions. Cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (denial of benefits to one class of illegitimate children is irrational in light of provision of such benefits to other illegitimate children).

Indeed, Congress' willingness to separate felons into more and less dangerous groups and to provide the less dangerous with the prospect of administrative relief, while refusing to do the same with the formerly committed, indicates that concern about administrative convenience played no rational part in Congress' decision. Cf. *City of Cleburne*, 87 L. Ed. 2d at 326-27 (various asserted governmental reasons for discriminating against the mentally retarded rejected as insufficient because the asserted rationales applied with equal force to other, non-retarded groups treated more favorably by the ordinance). Had Congress truly been concerned with administrative convenience, it would have treated the two groups similarly.<sup>65</sup>

<sup>65</sup> Even if Congress had decided that it would be too costly to provide individualized relief from this overbroad classification, and even if its provision of such relief to a group of felons did not render this decision irrational, the classification cannot be sustained. In a wide variety of situations, this Court has ruled that although using classifications to deny rights and grant benefits is cheaper and easier to administer than individualized determinations, "[t]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Thus, the Court has invalidated a number of legislative classifications which unnecessarily burdened persons who, on the face of the statute, fell within the classification at issue but whose inclusion did not, in fact, further the legislative purpose for which the classification was enacted. In those cases, the Court held that the Due Process Clause requires government at least to provide members of the class the opportunity

As with the zoning ordinance in *Cleburne*, the true basis of the statute's permanent disqualification of all formerly committed people is "irrational prejudice." *Id.* at 327. "Administrative convenience" in this case is nothing more than prejudice and stereotype under a neutral label. If allowed to stand, the statute will perpetuate the false ideas that generated it. The statute cannot withstand the scrutiny this Court applied in *City of Cleburne*.

### CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the decision of the United States District Court for the District of New Jersey.

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to demonstrate that their inclusion does not serve the statutory purpose. *See, e.g., Vlandis v. Kline*, 412 U.S. 441 (1973) (persons without legal address in the State entitled to individualized determination of residence for the purpose of obtaining low-cost college tuition); *Bell v. Burson*, 401 U.S. 535 (1971) (uninsured motorist involved in automobile accident who failed to post security deposit entitled to hearing on issue of fault before revocation of driver's license); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) (households with member under 18 years old claimed by nonhousehold member as a dependent for tax purposes entitled to hearing on need for food stamps).

## **APPENDICES**



## APPENDIX A

STATE STATUTES AUTHORIZING CIVIL  
COMMITMENT WITHOUT A FINDING OF  
DANGEROUSNESS

Thirty-four states authorize involuntary commitment of people who do not present an immediate danger to themselves but who are at risk because they are unable to provide for their basic needs as a result of mental illness or disorder. *See* Ariz. Rev. Stat. Ann. § 36-540 (Supp. 1984); Ark Stat. Ann. § 59-1410 (Supp. 1983); Cal. Welf. & Inst. Code § 5358 (West 1977 and Supp. 1981); Colo. Rev. Stat. Ann. § 27-10-101(5) (1973 and Supp. 1982); Conn. Gen. Stat. Ann. §§ 17-176, 17-1786(c) (West Supp. 1984); Fla. Stat. Ann. § 394.467 (West Supp. 1985); Ga. Code Ann. §§ 37-3-1(11), (12) (1980 and Supp. 1981); Hawaii Rev. Stat. § 334-1 (Supp. 1984); Idaho Code § 66-317(1)-(n) (Supp. 1984); Ill. Ann. Stat. ch. 91½ § 1-119 (Smith-Hurd Supp. 1984); Ind. Stat. Ann. § 16-14-9.1-1(b) (Burns Supp. 1984); Kan. Stat. Ann. § 59-2902(a) (1983); Ky. Rev. Stat. Ann. § 202A.011(2) (Baldwin 1982); La. Stat. Ann. ch. 28 § 55(E) (West 1979 and Supp. 1980); Mass. Ann. Laws ch. 122 § 8 (Michie/Law Co-op.) (Supp. 1985); Mich. Stat. Ann. § 14.800 (401a, b) (1980 and Supp. 1981); Minn. Stat. Ann. § 253B.02(13) (West Supp. 1985); Miss. Code Ann. § 41-21-61 (1972 and Supp. 1981); Neb. Rev. Stat. § 83-1009 (1979 and Supp. 1981); Nev. Rev. Stat. § 433A.310(1) (1983); N.J. Stat. Ann. §§ 30:4-44, 30:4-23 (1968 and Supp. 1982); N.M. Stat. Ann. § 543-1-3(M) (1984); N.C. Gen. Stat. §§ 122-58.2, 122-58.7 (1978 and Supp. 1981); N.D. Cent. Code § 25-03.1-02 (1980 and Supp. 1981); Ohio Rev. Stat. Ann. § 5122.01 (Baldwin 1975 and Supp. 1980); Ok. Stat. Ann. tit. 43A § 54.3(o) (West 1976 and Supp. 1980); Or. Rev. Stat. § 426.005 (1983); Pa. Stat. Ann. tit. 50 § 7301 (Purdon Supp. 1980); S.D. Codified Laws Ann. § 27A-1-1 (1980 and Supp. 1981); Utah Code Ann.

§ 64-7-36 (10) (1978 and Supp. 1981); Vt. Stat. Ann. tit. 18 § 7101(17) (B) (ii) (1982 Cum. Supp.); Va. Code § 37.1-67.3 (1982 Cum. Supp.); Wash. Rev. Code Ann. §§ 71.05.020(1), 71.05.280 (1976 and Supp. 1980); W.Va. Code Ann. § 27-1-2 (Supp. 1984); Wisc. Stat. Ann. § 51.20(1) (West 1981).

## APPENDIX B

### STATE STATUTES REQUIRING PERIODIC REVIEW OF CIVIL COMMITMENT ORDERS

Thirty-two states provide for periodic judicial review either by limiting the duration of each commitment order and requiring a new hearing for recommitment or by mandating an automatic court review of the original order on a periodic basis. *See* Alaska Stat. § 47.30.745 (1984); Ariz. Rev. Stat. § 36-540 (Supp. 1984); Ark. Stat. Ann. § 59-1410 (Supp. 1983); Cal. Welf. and Inst. Code Ann. § 27-10-109 (1982); Conn. Gen. Stat. Ann. § 17-178(g) (West Supp. 1984); Del. Code Ann. tit. 16 § 5102 (1983); Hawaii Rev. Ct. Stat. § 334-60.6 (Supp. 1984); Idaho Code § 66-329(k) (Supp. 1984); Ill. Ann. Stat. ch. 91½ § 3-813 (Smith-Hurd Supp. 1984); Kan. Stat. Ann. § 59-2917a (1983); Ky. Rev. Stat. Ann. § 202A.051 (Baldwin 1982); La. Rev. Stat. Ann. § 28.56 (West 1979 and Supp. 1980); Me. Rev. Stat. tit. 34B § 3864(t); Mass. Ann. Laws ch. 123, § 8 (Michie/Law Co-op. Supp. 1985); Minn. Stat. Ann. § 253B.13(1) (West Supp. 1985); Mo. Ann. Stat. §§ 632.355, 632.360 (Vernon Supp. 1985); Mont. Rev. Codes Ann. § 53-21-128 (1983); Nev. Rev. Stat. § 433A-310(2) (1983); N.H. Rev. Stat. Ann. § 135-B:38; N.J. Court Rule § 4:74-7(f) (1984); N.M. Stat. Ann. § 43-1-12(c) (1984); N.Y. Ment. Hyg. Law § 9.33(d) (McKinney); N. C. Gen. Stat. § 122.58.11(e) (1978 and Supp. 1981); Ohio Rev. Code Ann. § 5122.15(h) (Supp. 1984); Or. Rev. Stat. §§ 426.130, 426.301 (1983); Pa. Stat. Ann. tit. 50 § 7305(a) (Purdon Supp. 1980); R.I. Gen. Laws §§ 40.1-5-8(10), 40.1-5-11(3) (1984); Tex. Rev. Civ. Stat. Ann. § 5547-55(g) (Vernon Supp. 1985); Va. Code § 37.1-67.3 (1984); Wash. Rev. Code Ann. § 71.05.320(2); Wisc. Stat. Ann. § 51.20(13)(g) (West Supp. 1984-1985). Five additional states empower a hearing examiner or other staff outside the hospital to

review the commitment order. *See* Fla. Stat. Ann. § 394.467(2)(d) (West Supp. 1985); Ga. Code Ann. § 37-3-83; Md. Admin. Code tit. 10 § 21.01.08 (Supp. 1984); S.D. Codified Laws Ann. § 27A-9-18 (1984); W.Va. Code § 27-5-4(k)-4 (Supp. 1984). And in seven other states, the hospital must file a periodic report with the court detailing the patient's condition and the basis for continued commitment. *See* Ala. Code § 22-52-12(b) (1984); Ind. Code Ann. § 16-14-9.1(c) (Burns Supp. 1984); Iowa Code Ann. § 229.15 (West 1985); Mich. Stat. Ann. § 14.800(483) (1980 and Supp. 1981); Neb. Rev. Stat. § 83-1037; N.D. Cent. Code §§ 25-03.1-22(i), 25-03.1-31 (Supp. 1983); Wyo. Stat. § 25-10-116 (1982). Only six states and the District of Columbia do not require an automatic periodic independent review of commitment orders. *See* D.C. Code § 21-501; Miss. Code Ann. § 41-21-83 (Supp. 1984); Okla. Stat. Ann. tit. 43A § 54.4 (West Supp. 1984); S.C. Code Ann. § 44-17.580 (Law Co-op. 1985); Tenn. Code Ann. § 33-6-104 (Supp. 1984); Utah Code Ann. § 64-7-36(11); Vt. Stat. Ann. tit. 18 § 7621 (Supp. 1984).

# APPENDIX C

## STATE STATUTES LIMITING ISSUANCE OF DRIVER'S LICENSES TO THE MENTALLY DISORDERED

The forty-six state statutes are: Ala. Code §§ 32-6-7(5) & (6) (1975 & Supp. 1982); Alas. Stat. §§ 28.15.031(4) & (5) (1962 & Supp. 1982); Ariz. Rev. Stat. Ann. § 28-413(5) (1975 & Supp. 1982); Ark. Stat. Ann. § 75-309(5) (1976 & Supp. 1981); Cal. Veh. Code §§ 12805(e)(2) & 12806(a) (West 1977 & Supp. 1981); Colo. Rev. Stat. § 42-2-119(1)(b) (1973 & Supp. 1982); Conn. Gen. Stat. Ann. § 14-36(b) (West 1970 & Supp. 1981); Del. Code Ann. §§ 2707(b)(4) & (5) (1974 Supp. 1980); D.C. Code Ann. § 40-301(a)(1) (1973 & Supp. 1978); Fla. Stat. Ann. § 322.05(5) (West 1976 & Supp. 1980); Ga. Code Ann. § 68B-203(6)(4) (1980 & Supp. 1981); Hawaii Rev. Stat. Ann. § 286-104(6) (1976 & Supp. 1980); Idaho Code Ann. § 49-309(5) (1980 & Supp. 1981); Ill. Ann. Stat. tit. 95½, § 6-103(8) (Smith-Hurd 1971 & Supp. 1980); Ind. Code Ann. §§ 9-1-4-30(d)-(e) (Burns 1972 & Supp. 1981); Iowa Code Ann. §§ 321.177(5) & (7) (West 1966 & Supp. 1980); Kan. Stat. Ann. § 8-237(e) (1976 & Supp. 1980); Ky. Rev. Stat. Ann. §§ 186.440(5)-(6) (Michie 1980 & Supp. 1983); Md. Transp. Ann. Code § 16-103.1 (1980); Mich. Comp. Laws Ann. §§ 257.303(e)-(f) (Supp. 1980); Minn. Stat. Ann. §§ 171.04(5) & (9) (West 1975 & Supp. 1980); Miss. Code Ann. §§ 63-1-9(d) & (f) (1972 & Supp. 1981); Mo. Rev. Stat. § 302.060(5) (1980); Mont. Code § 61-5-105(5) (1979); Neb. Rev. Stat. § 60-419 (1979 & Supp. 1981); Nev. Rev. Stat. § 483.250(4) (1981); N.H. Rev. Stat. Ann. § 262.40 (1979); N.M. Stat. Ann. § 66.5-5E (1978 & Supp. 1981); N.C. Gen. Stat. §§ 20-9(d)-(e) (1978 & Supp. 1981); N.D. Cent. Code § 39-06-03(4) (1980 & Supp. 1981); Ohio Rev. Code Ann. § 4507.08(B) (Bladwin 1975 & Supp. 1980);



Okla. Stat. tit. 47, § 6-103(5) (West 1976 & Supp. 1980); Or. Rev. Stat. §§ 482.120(2) & 482.130(1)(b) (1979); Pa. Stat. Ann. tit. 75, § 1503(4) (Purdon 1977 & Supp. 1980); R.I. Gen. Laws § 31-10-3(5) (1969 & Supp. 1981); S.C. Code Ann. § 56-1-40(4) (Law Co-op. 1976 & Supp. 1980); S.D. Codified Laws Ann. § 32-12-32 (1980 & Supp. 1981); Tenn. Code Ann. § 55-7-105(a) (5) (1980); Tex. Rev. Civ. Stat. Ann. §§ 6687b(4), (6) & (8) (Vernon 1967 & Supp. 1980); Utah Code Ann. § 41-2-5(4) (1978 & Supp. 1981); Vt. Stat. Ann. tit. 23, § 603 (1978 & Supp. 1980); Wash. Rev. Code Ann. §§ 46.20.031(5) & (8) (1976 & Supp. 1980); W. Va. Code § 17B-2-3(5) (1981); Wisc. Stat. Ann. § 343.06(5) (West 1981); Wyo. Stat. §§ 31-7-108(b)(iii)-(v) (1980 & Supp. 1981). Four states, Louisiana, Maine, Massachusetts and New Jersey do not specifically disqualify persons with mental disabilities.

## APPENDIX D

### STATE STATUTES AFFECTING THE VOTING RIGHTS OF THE MENTALLY DISABLED

#### APPENDIX D-1:

Ala. Const. art. VIII, § 812, Ark. Const. art. III § 5; Cal. Const. art. II § 4; Conn. Gen. Stat. Ann. § 9-12(a) (West 1970 and Supp. 1981); Del. Const. art. V, § 2; Ga. Const. § 2-501; Hawaii Const. art. II, § 2; Iowa Const. art. II, § 5; Ky. Const. § 145.1; Miss. Const. art. XII, § 241; Neb. Const. art. VI, § 2; Nev. Const. art. II, § 1; N.J. Const. art. II, § 6; N.M. Const. art. VII, § 1; Ohio Const. art. V, § 6; Ore. Const. art. II, § 3; S.C. Code Ann. § 7-5-120(5)(a) (Law Co-op. 1976 and Supp. 1980); S.D. Const. art. VII, § 2; Tex. Const. art. VI, § 1; Utah Const. art. IV § 6; Vt. Const. ch. II, § 42; Wash. Const. art. VI, § 3; W.Va. Const. art. IV, § 1; and Wyo. Const. art. VI, § 6.

#### APPENDIX D-2:

Alas. Const. art. V, § 2; Ariz. Const. art. VII, § 2; D.C. Code Ann. § 1-1102(c) (1973 and Supp. 1978); Fla. Stat. Ann. § 97-041(3)(a) (West 1976 and Supp. 1980); Idaho Const. art. VI, § 3; La. Rev. Stat. Ann. § 18:102 (1) (West 1979 and Supp. 1980); Me. Const. art. II, § 1; Md. Const. art. I, § 4; Mass. Const. articles of amendment art. III, § 105; Minn. Const. art. VII, § 1; Mo. Const. art. VIII, § 2; Mont. Const. art. IV, § 2; N.Y. Elect. Laws § 5-106(6) (McKinney 1978 and Supp. 1980); N.D. Cent. Code § 16.1-01-04(5) (1980 and Supp. 1981); R.I. Const. articles of amendment art. XXXVIII, § 1; Va. Const. art. II, § 1; and Wisc. Stat. Ann. § 6.03(3) (West 1981).

**AMICUS CURIAE**

**BRIEF**

9  
NO. 84-1904

Supreme Court, U.S.

FILED

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In The  
**Supreme Court of the United States**  
October Term, 1985

UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,  
*Appellant,*

vs.

ANTHONY J. GALIOTO,  
*Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE  
NEW JERSEY DEPARTMENT OF THE PUBLIC  
ADVOCATE, DIVISION OF MENTAL HEALTH  
ADVOCACY AND AMERICAN CIVIL LIBERTIES UNION  
OF NEW JERSEY AS AMICI CURIAE

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1985

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No. 84-1904

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UNITED STATES DEPARTMENT OF THE TREASURY,  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Appellant

v.

ANTHONY J. GALIOTO

Appellee

---

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF NEW JERSEY

---

MOTION BY THE NEW JERSEY DEPARTMENT  
OF THE PUBLIC ADVOCATE, DIVISION OF  
MENTAL HEALTH ADVOCACY AND THE  
AMERICAN CIVIL LIBERTIES UNION OF  
NEW JERSEY TO PARTICIPATE AS  
AMICI CURIAE IN SUPPORT OF APPELLEE

---

The New Jersey Department of the Public  
Advocate [hereinafter the Department] and  
the American Civil Liberties Union of New  
Jersey [hereinafter ACLU-NJ] respectfully  
move this Court for leave to file the  
attached brief as amici curiae in this case.

No objection to participation has been received from either the Appellant, United States Department of the Treasury, or Appellee, Anthony Galioto. Written consents will be forwarded immediately upon receipt. The attached brief is submitted in support of Appellee.

The Department is a cabinet-level agency of New Jersey state government. N.J.S.A. 52:27E-2. The Department's Division of Mental Health Advocacy was established to represent "... indigent mental hospital admittees ..." in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "... an issue of general application to them." N.J.S.A. 52:27E-25.

The interest of the Department in this case arises from its regular participation as counsel for individuals facing

civil commitment to mental hospitals in New Jersey. The Division, established in 1974, has had the unique experience of both witnessing and participating in substantial changes in practice and procedure with respect to civil commitment proceedings.\* Indeed, since its inception in 1974, the Division has represented 43,809 clients in individual matters, of which approximately 80% were commitment and periodic review hearings. The long-standing and extensive involvement of the Division in the civil commitment process renders it uniquely qualified to participate as amicus curiae.

The ACLU-NJ is the New Jersey affiliate of the American Civil Liberties Union (ACLU),

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\*The Department has participated before this Court as amicus curiae in a number of other cases in this area. See, e.g., Ake v. Oklahoma, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1007 (1985); Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); and Kremens v. Bartley, 431 U.S. 119 (1977).



a nationwide, non-partisan organization of more than 250,000 members dedicated to the protection of civil rights and civil liberties.

The ACLU and its state affiliates have long worked to uphold the rights of disadvantaged groups under the equal protection clause of the Fifth and Fourteenth Amendments. It has also frequently asserted the federal statutory and constitutional rights of the handicapped and of persons affected by mental disabilities and is thus qualified to participate as amicus curiae.

This case presents the Court with an important opportunity to contribute to the correction of society's stereotypical perception of persons who have suffered from mental illness. In the words of the District Court, "[t]o impose a perpetual and permanent ban against anyone who has ever been committed for mental illness, no matter how ancient the commitment or how complete the

cure, is to elevate superstition over science and unsupported fear over equal protection and due process."

Amici will argue that the legitimate purposes of gun control intended by the Act was overshadowed by prejudice and stereotypes in imposing a permanent blanket firearms disqualification on all persons with a history of civil commitment. Civil commitment is first, no indication of present mental status, and second, it is an unreliable indicator of dangerous mental illness. Finally, amici will argue that, of the categories of individuals subject to firearms disqualifications, only former involuntary inpatients are disqualified with absolutely no mechanism by which they may be relieved. Amici will argue that this violates the Fifth Amendment's guarantee of equal protection.

For the above reasons, it is respectfully submitted that the motion for leave to file the annexed brief as amicus curiae should be granted.

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PUBLIC ADVOCATE

BY: Penelope A. Boyd

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BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

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ANTHONY J. GALIOTO

Appellee

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ON APPEAL FROM THE UNITED STATES  
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BRIEF FOR THE  
NEW JERSEY DEPARTMENT OF THE PUBLIC  
ADVOCATE, DIVISION OF MENTAL HEALTH  
ADVOCACY AND THE AMERICAN CIVIL  
LIBERTIES UNION OF NEW JERSEY AS  
AMICI CURIAE IN SUPPORT OF APPELLEE

---

I. INTEREST OF AMICI CURIAE

A. NEW JERSEY DEPARTMENT OF THE PUBLIC  
ADVOCATE, DIVISION OF MENTAL HEALTH  
ADVOCACY

The New Jersey Department of the  
Public Advocate, Division of Mental Health  
Advocacy, [hereinafter the Division] sub-  
mits this brief in support of Appellee



Anthony Galioto.

The Division was specifically created as a subdivision of the cabinet level Department<sup>1</sup> to provide representation to "indigent mental hospital admittees"<sup>2</sup> in matters pertaining to their "admission to, retention in, or discharge from" mental hospitals in the State. N.J.S.A. 52:27E-24. In addition, the Division is given the authority by State law to represent the interests of mental hospital admittees on issues which affect them as a class. N.J.S.A. 52:27E-25.

In fulfillment of this obligation, the Division provides legal representation to residents of nine of New Jersey's twenty-one counties on 7,700 matters per year, including initial commitment hearings, periodic reviews of civil commitments,

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<sup>1</sup> N.J.S.A. 52:27E-2.

<sup>2</sup> N.J.S.A. 52:27E-23.

commitments of persons found not guilty by reason of insanity or incompetent to stand trial, as well as other issues affecting persons with involvement in the mental health system.

Because of this day-to-day involvement with the mental health system and the people in it, the Division is not only concerned about the procedure surrounding civil commitment and the adequacy of the treatment received by persons in the mental health system, but also with the collateral consequences of an order of civil commitment. This case involves a classic example of such a collateral consequence. The Division has a substantial interest in this Court's consideration of any statute that completely and irrevocably bars persons who have received involuntary inpatient mental health treatment from the opportunity to exercise rights or privileges held by other residents of the State.

B. AMERICAN CIVIL LIBERTIES UNION OF  
NEW JERSEY

The ACLU-NJ is the New Jersey affiliate of the American Civil Liberties Union (ACLU), a nationwide, non-partisan organization of more than 250,000 members dedicated to the protection of civil rights and civil liberties.

The ACLU and its state affiliates have long worked to uphold the rights of disadvantaged groups under the equal protection clause of the Fifth and the Fourteenth Amendments. It has also frequently asserted the federal statutory and constitutional rights of the handicapped and of persons affected by mental disabilities.

This case presents the Court with an important opportunity to contribute to the correction of society's stereotypical perception of persons who have suffered from mental illness. In the words of the District Court, "[t]o impose a perpetual



and permanent ban against anyone who has ever been committed for mental illness, no matter how ancient the commitment or how complete the cure, is to elevate superstition over science and unsupported fear over equal protection and due process." J.S. at 2a.

## II. SUMMARY OF ARGUMENT

Congress enacted the Omnibus Crime Control and Safe Streets Act, as amended by the Gun Control Act of 1968, initially as a means of limiting access to weapons by those deemed unfit to have them by virtue of state law. As part of its provisions, it imposed a permanent disqualification of firearms purchase on persons who had been involuntarily committed to a mental hospital.

Involuntary commitment is not a rational basis for determining firearms disqualification. Present illness cannot

be inferred from a past commitment. In addition, the absence of due process protections in the commitment process make it more unreliable and irrational as a determination of present capacity to handle a firearm.

Former patients are the only group included in the legislative scheme which has no hope of release from the firearm disqualification. Thus, while Appellee has proven to a New Jersey Court that he is presently competent to handle a firearm, he is denied the same opportunity with respect to the federal requirements. Had Appellee been convicted of a crime, however, he would have had an opportunity to demonstrate his rehabilitation. The statutory scheme is thus irrational and a violation of the Fifth Amendment's guarantee of equal protection of law.

III. ARGUMENT

- A. THE STATUTORY SCHEME IMPOSED BY TITLE IV OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY THE GUN CONTROL ACT OF 1968, SUBJECTS FORMER INVOLUNTARY INPATIENTS TO AN IRRATIONAL CLASSIFICATION IN VIOLATION OF EQUAL PROTECTION PRINCIPLES.

This case presents the Court with the question of whether Congress may impose permanent and lifelong firearms disqualification as a collateral consequence of a single involuntary civil commitment for inpatient mental health treatment consistent with the equal protection guarantees of the Fifth Amendment of the United States Constitution. Amici submit that the statutory scheme imposed by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, subjects former involuntary inpatients to an irrational classification in violation of equal protection principles.



The guarantee of equal protection of the laws is "... essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 3249, 3254 (1985). Legislative classifications, at a minimum, "... must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation ..." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 314, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). See also, Johnson v. Robison, 415 U.S. 361, 375, 94 S.Ct. 1160, 1169, 39 L.Ed. 2d 389 (1974); Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed. 2d 225 (1970). Equal protection requires, first, identification of Congress' purpose for making classifications; second, an identification of the distinctions between former involuntary inpatients and convicted felons; and

third, a determination as to whether this distinction is rationally related to achievement of a legitimate purpose. The classification here lacks such a relation to the object of legislation, and is premised upon the "stereotypes" and "prejudices" forbidden by this Court in City of Cleburne, supra.

B. THE CONGRESSIONAL GOAL OF SUPPORTING STATE GUN CONTROL EFFORTS BY LIMITING ACCESS TO FIREARMS BY PERSONS NOT COMPETENT TO HANDLE THEM BY VIRTUE OF MENTAL DISABILITY IS NOT FURTHERED BY THE IRRATIONAL CLASSIFICATION SCHEME CONTAINED IN THE ACT.

In passing the gun control provisions of the Title IV Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968, Congress intended to support State gun control efforts by limiting access to weapons by certain categories of people designated as

"especially risky people."<sup>3</sup> To accomplish this purpose, Congress imposed licensing requirements on dealers of firearms in interstate commerce, 18 U.S.C. §923, and, inter alia, prohibited the sale, receipt, shipment, or transportation of firearms or ammunition by or to any persons under indictment or convicted of a crime punishable by imprisonment for a term exceeding one year; any fugitive from justice; certain drug users and addicts; and any person who "has been adjudicated as a mental defective

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<sup>3</sup> The impetus behind the legislative action was the legislative belief that persons in "strong" gun control states who might not be able to acquire weapons in their home states, were securing weapons through the mail or by crossing state lines to "weak" gun control states. See, e.g., House Report 1577, 1968 U.S. Code Cong. & Ad. News 4410, 4413, 4425 (1968). The purpose of the legislation was to "... control [the] indiscriminate flow of such weapons across State borders and to assist and encourage states and local communities to adopt and enforce stricter gun control laws." Id.



or who has been committed to a mental institution ..." J.A. 1a-3a. [18 U.S.C. 922(d), 922(g), 922(h).]<sup>4</sup>

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<sup>4</sup> Shortly after its enactment of Title IV, Congress enacted further gun control legislation, in 18 U.S.C. App. 1202 [hereinafter Title VII]. In Title VII, Congress prohibited the receipt, possession of transportation of a firearm in commerce by any person who is a convicted felon, was dishonorably discharged from the Armed Forces, has renounced United States citizenship, is an illegal alien or "... has been adjudged by a court of the United States or of a state or any political subdivision thereof of being mentally incompetent ..." J.A. 4 [18 U.S.C. App. 1202(a)(3)]. Title VII, added as a floor amendment, has little legislative history. See, Lewis v. U.S., 445 U.S. 55, 62 (1980).

Amici note that this statute by its language is not applicable here, as there is no evidence Galioto has ever been "adjudicated mentally incompetent" or that he could be charged under Title VII. See, N.J.S.A. 3B:12-28, N.J.Ct.R. 4:83. Title VII reaches substantial groups not covered by Title IV. See, United States v. Bass, 404 U.S. 336, 342 (1971). For example, its terms encompass adjudicated mental incompetents, a different group than adjudicated mental defectives or persons committed to a mental institution. The Government's use of the term "persons with a history of commitment," Government Brief at 13, n.7, to include all three groups is thus not accurate for purposes of this case.

The legislative disqualification may be lifted in the case of persons convicted of a crime punishable by imprisonment for a term exceeding one year (unless the crime involved the use of a weapon) if the Secretary of the Treasury determines that: "... the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. §925(c). Thus, convicted felons have the opportunity to avoid the penalizing effect of the Act; however, no such opportunity exists for persons once committed to a mental hospital.

As the District Court noted:

"The statute thus implies that mental illness is incurable, and that those persons with a history of mental illness who have never committed a crime are deemed more likely to commit one in the future than those persons who have actually done so in the past."

J.S. at 1a-2a. (602 F.Supp. at 683.)

Amici submit that this legislative scheme is irrational on two levels: First, the statute prohibits the sale or transport of weapons by former involuntary inpatients regardless of their recovery from past mental illness or the passage of time since commitment. This is not a rational basis for an absolute presumption of present mental illness. Second, the statute distinguishes between the convicted felon and the former mental patient by forever denying the right to acquire firearms to former mental patients, while allowing the convicted felon the opportunity to overcome his/her disqualification. Even if it is assumed that a prior commitment properly opens the inquiry into present mental status, there is no rational basis for denying the opportunity to demonstrate rehabilitation when granting the opportunity to convicted felons.



C. ALTHOUGH CONGRESS HAD A LEGITIMATE INTEREST IN LIMITING ACCESS TO FIREARMS BY PERSONS NOT CAPABLE OF HANDLING THEM SAFELY, SUCH PURPOSE CANNOT LEGITIMATELY BE ACCOMPLISHED BY THE DISQUALIFICATION OF ALL FORMER INVOLUNTARY PSYCHIATRIC INPATIENTS.

As the legislative history demonstrates, Congress was seriously concerned with the growing problems of violent crime involving firearms in its passage of Title IV. In the wake of several assassinations and a perceived rise in violent crime, Congress determined that some form of gun control was necessary.<sup>5</sup> Traffic in firearms was limited by prohibiting sales to felons, fugitives, drug users and addicts, and persons "... adjudicated mentally defective" or "committed to a mental institution." 18 U.S.C. §922(c). In prohibiting the sale or transport of weapons to persons who had

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<sup>5</sup> See, P.L. 90-531, 82 Stat. 225, §901 (Title IV). See also, 18 U.S.C. App. 1201 [Congressional findings with respect to Title VII].

been committed to mental hospitals or had been adjudicated mentally defective,<sup>6</sup> Congress intended that persons who were not competent to handle them by virtue of mental disability would be unable to secure weapons. The legitimate purpose of gun control was colored by Congressional prejudices and misconceptions about mental illness and the mentally ill, which resulted in a permanent blanket disqualification of all persons who had ever been committed to a mental hospital. As a result, former patients were irrevocably excluded from the ranks of "law-abiding citizens" whose "... acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting,

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<sup>6</sup> While not defined in the statute, Amici suggest that the commonly accepted definition of mental deficiency, relating to mental retardation, does not apply in this case. See, e.g., United States v. Hansel, 474 F.2d 1120, 1123-1125 (8th Cir. 1973).

personal protection, or any other lawful activity ..." was not to be unreasonably impeded by the Act. P.L. 90-351, 82 Stat. 226, §901(b) as amended, P.L. 90-618, 82 Stat. 1213-1214.

It is clear from the legislative history that Congressional concern focused upon persons with existing mental illness that resulted in violence.<sup>7</sup> Unfortunately, the legislative history also suggests that Congress was motivated by an "irrational prejudice"<sup>8</sup> in selecting all persons who were formerly committed for permanent disqualification. It is clear that Congress relied on "... mere negative attitudes [and] fear, unsubstantiated by factors properly cognizable ..." in a legislative evaluation of

<sup>7</sup> See, e.g., 114 Cong. Rec. 21819 (1968), 114 Cong. Rec. 21829 (1968), 114 Cong. Rec. 21811 (1968), 114 Cong. Rec. 13868 (1968), and 114 Cong. Rec. 21813 (1968).

<sup>8</sup> City of Cleburne v. Cleburne Living Center, 105 S.Ct. at 3260.



an effective means of gun control.<sup>9</sup> See, City of Cleburne v. Cleburne Living Center, \_\_\_ U.S. \_\_\_, 105 S.Ct. 3249, 3259 (1985).

<sup>9</sup> In its brief, the government asserts that one of Congress' central purposes in passing the Gun Control Act was to keep firearms out of the hands of persons who have suffered from "mental disturbances." Government Brief at 30. A closer analysis of the Congressional Record indicates that the members of Congress repeatedly used language much more derogatory and inflammatory than mere "mental disturbances." Plainly, prejudicial and stereotypical beliefs about the mentally ill were expressed in terms such as: "The demented, the deranged ..." 114 Cong. Rec. 21812 (1968) (remarks of Rep. Schwengel); "mental cases," *id.* at 22262 (remarks of Rep. Fiskin); "the mentally deranged," *id.* at 21791 (remarks of Rep. Thompson); "lunatics," *id.* at 22747 (remarks of Rep. McClory); *id.* at 12305 (remarks of Sen. Dodd); *id.* at 13863 (remarks of Sen. Long); *id.* at 16292 (remarks of Rep. Boland); "psychotics," *id.* at 21838 (remarks of Rep. Boland); "psychopaths," *id.* at 21838 (remarks of Rep. Gilbert); *id.* at 23091 (remarks of Rep. Donahue); "insane persons," *id.* at 11614 (remarks of Sen. Thurmond); *id.* at 13642 (remarks of Sen. Dodd); "idiot[s]" *id.* at 12056 (remarks of Sen. Tydings); "madman," *id.* at 12304 (remarks of Sen. Dodd); "certified madmen," *id.* at 12312 (remarks of Sen. Dodd); "berserk killer," *id.* at 13621 (remarks of Sen. Dodd); "idiots and morans," *id.* at 13868 (remarks of Sen. Long); "certified lunatics," *id.* at 12477 (remarks of Sen. Dodd); "psychopaths and nincompoops," *id.* at 16274 (remarks of Rep. Eckhardt).

This prejudice manifested itself in an assumption that all persons with a history of mental illness remained mentally ill for life, and secondly, that all mentally ill persons were dangerous and psychotic. Neither assumption is borne out in fact. What is apparent is that Congress was acting from many of the historical misconceptions about the mentally ill.

Recently, The President's Commission on Mental Health noted that "[i]n attempting to understand mental illness, it is worth remembering the observation made by the Joint Commission on Mental Illness and Health that unlike physical illness, mental illness tends to disturb and repel people rather than evoke their sympathy and desire to help." Report to the President, The President's Commission on Mental Health, Vol. I, p.56 (1978). As a result, the mentally ill were historically shunned, imprisoned, and abused. See, e.g.,

G. Rosen, Madness in Society (1968); H. Foley & S. Sharfstein, Madness & Government (1983); D. Rothman, The Discovery of the Asylum (1971); A. Deutsch, The Mentally Ill in America (2d ed., 1949). The misconceptions which led to these persecutions have been slow in dissipating.

Major advances have been made in psychiatry which increase the chances of recovery from serious mental illness:

The possibility of full and permanent recovery from a schizophrenic attack is probably considerably brighter today than it was a half century ago, when the chances for such recovery were only 2 to 4 percent.

See, e.g., Lehman & Canero, "Schizophrenia: Clinical Features," Comprehensive Textbook of Psychiatry, Vol. I, p.680, 709 (Kaplan & Sadock, eds., 1985). Today, studies



suggest that as many as half of all persons diagnosed as schizophrenic fully recover.<sup>10</sup>

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<sup>10</sup> See, "Schizophrenics Can Lead Normal Lives, 30 Year Study Concludes," Psychiatric News, June 21, 1985; Ciompi, "Catamnestic Long-term Study on the Course of Life and Aging of Schizophrenics," 6 Schizophrenic Bull. 606 (1980); World Health Organization, Psychiatric and Personal History Schedule, 368 (1978). Certainly, a diagnosis of schizophrenia is no reason to lose hope for a person's recovery. See, M. Bleuler, "The Long-Term Course of Schizophrenic Psychoses," Nature of Schizophrenia: New Findings and Future Strategies, 631 636 (Wynne, Cromwell & Matthysse, eds., 1978) ["The discovery that so much of the inner life of the schizophrenic remains human, natural and healthy, is further reason to appreciate the high significance of therapy for schizophrenic patients"].

1. A History Of Involuntary Commitment Is Not A Rational Basis For Presuming Present Mental Illness.

A history of involuntary commitment is not a rational basis for presuming present mental illness and incapacity to safely handle a firearm. Involuntary commitment, without consideration of elapsed time, circumstances leading to confinement or recovery from mental illness, is simply an irrational and unreliable means of achieving the Congressional objective.

Thus, for example, a person hospitalized following the death of a spouse would be forever stigmatized by the civil commitment regardless of recovery or unlikelihood that the disorder will recur. Similarly, individuals committed as the result of a physical disorder which first appears to be a mental disorder would be permanently disqualified even when the underlying physical disorder

is cured.<sup>11</sup> Mental illness is no longer considered incurable and a history of commitment cannot be used as the sole justification for denial of firearm privileges:

At least 7 out of 10 patients admitted to a mental hospital can leave partially or totally recovered with prompt and proper treatment. One large health insurance company reports that the average length of hospitalization for holders of its insurance is only 13 days, and about 80% leave the

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<sup>11</sup> Certain forms of delirium have physical causes such as encephalitis, reactions to antihypertensive medication, or endocrine dysfunction. See, C.E. Wells, "Organic Mental Disorders" Comprehensive Textbook of Psychiatry, Vol. I, p.834, 844 (Kaplan & Sadock, eds., 1985).



hospital within the first year.  
Constitutional Rights of the  
Mentally Ill, Hearings before  
 the Subcommittee on Constitu-  
 tional Rights of the Committee  
 on the Judiciary, United States  
 Senate, Ninety-First Congress  
 at 503 (1970) (Statement of  
 the National Association for  
 Mental Health, Inc.)

The Statute's plain language,  
Dickerson v. New Banner Institute, 103  
S.Ct. 987, 990 (1983), prohibits the sale  
 to, receipt of, or transportation of  
 firearms to any person "... who has been  
 committed to a mental institution."<sup>12</sup>  
 J.A. 1a-3a.

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<sup>12</sup> Unlike the provisions of Title IV (and  
 Title VII) which define the disqualifying  
 conviction, there is no similar definition  
 of "commitment." Congress apparently in-  
 tended to defer to State Law on the matter.  
See, 27 C.F.R. §178.11 [defining the terms  
 "fugitive from justice" and "discharged  
 under dishonorable conditions" as they  
 apply to firearms disabilities]. See also,  
 18 U.S.C. §927 (effect on state law).

This language has been construed by the Secretary of the Treasury, who is charged with its enforcement, to include all persons who have had "... some adjudication or formal commitment ..." J.A. 19. "[V]oluntary admission to a mental hospital does not result in Federal firearms disabilities." Id. Similarly, according to BATF, firearms disabilities do apply to persons "... discharged on a determination other than a finding that [the person] was competent in accordance with the laws of the State in which he was committed." J.A. 20. This, it is formal involuntary commitment which triggers the federal law.<sup>13</sup>

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<sup>13</sup> It is important to note that this statute, as interpreted by the BATF, places individuals who seek inpatient mental health services on a voluntary basis, entirely outside the prohibition. See, e.g., J.A. 19. Voluntary treatment may be sought by a "... resident of the (footnote cont'd. on following page)

Denial of firearms of persons who have been committed to mental hospitals at some point in their lives is not a rational means of achieving the concededly legitimate Congressional objective of keeping firearms from persons unable, by virtue of disability, to use them safely.<sup>14</sup>

(footnote cont'd. from previous page)

State, 18 years of age or older believing himself to be mentally ill, and being desirous of obtaining treatment for the betterment of his mental condition ..."  
N.J.S.A. 30:4-46. Had Anthony Galioto not indicated he wished to terminate his voluntary status and leave Fair Oaks Hospital, he would not have precipitated an involuntary commitment and would be eligible to possess a firearm today. There was thus no correlation between Galioto's voluntary status and his potential for danger. See, infra, pp.30-31.

<sup>14</sup> "The sporadic violence of so-called 'mentally ill killers' as depicted in stories and drama [on television] is more a device of fiction than a fact of life. Patients with serious psychological disorders are more likely to be withdrawn, apathetic and fearful. We do not deny that some mentally ill people are violent, but the image of the mentally ill person as essentially a violent person is erroneous." Report to the President,



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(footnote cont'd. from previous page)

The President's Commission on Mental Health, Vol. I, p. (1978).

The irrationality of the statutory scheme is further demonstrated by contrasting the differential treatment afforded drug addicts and mental patients. For each group, a medical condition disqualifies persons under the statute. For each group, the disability can be permanent or temporary. The federal firearm disability is not permanent when triggered by drugs or addiction, see, 18 U.S.C. §922(g)(3); the disability is permanent, however, if one is committed to a mental institution or adjudged to be mentally incompetent. *Id.* 18 U.S.C. App. 1202(a) (3). Under New Jersey law, drug addiction is a basis for an adjudication of incompetency; but the adjudication of mental incompetency is removed if the drug addict has reformed and not been a chronic user of drugs for one year, *N.J.S.A. 3B:12-28*. Therefore, a reformed drug addict will be able to purchase firearms unless, while an addict, he has been committed to a mental hospital or adjudicated mentally incompetent by reason of his addiction, in which event his disability becomes permanent, regardless of his subsequent reformation and an adjudication that he is no longer mentally incompetent.

2. A History of Civil Commitment  
In New Jersey Is Not Necessarily  
An Adjudication Of Dangerous  
Mental Illness.

A history of civil commitment in New Jersey is not necessarily an adjudication of dangerous mental illness or an adjudication of mental incompetence. See, N.J.S.A. 30:4-24.2(b). It was not until 1975 that this Court determined that under the Constitution:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

Thousands of people routinely committed if determined to have "... mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the

community"<sup>15</sup> are presently suffering the collateral consequences of a constitutionally questionable order of confinement.<sup>16</sup> Id. at 576. See also, N.J.S.A. 30:4-27.

Between 1965 and 1975 persons were routinely incarcerated in mental hospitals, without a finding that they presented any risk to anyone.<sup>17</sup> Required forms, such as

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<sup>15</sup> N.J.S.A. 30:4-23.

<sup>16</sup> Similarly, the Court Rule which existed in 1971, the year Mr. Galioto was committed, required the Court to determine whether the person was "... insane and a proper person to be confined in one of the institutions for the insane in the State ..." 1971 Rule 4:74-7(g) at P-3a. [The attached appendix is designated as P-1a, et seq.] Plainly, dangerousness was no pre-requisite to commitment.

<sup>17</sup> It appears from this record that the only specific violent behavior exhibited by Mr. Galioto was "... destroying part of the house when he could not control his anxiety and became overwhelmed by his delusions." J.A. 8. The nature and extent of the damage to property was not clear from this record. Mr. Galioto's treating psychiatrist of eleven years stated that "Mr. Galioto has never displayed any destructive tendencies either toward himself or others." J.A. 12.



the application for commitment, physicians' certificates in support of the application or the forms of order made no reference to evaluation of or opinion of the individual's danger to self or others,<sup>18</sup> but focused

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<sup>18</sup> The effects of the practices were most succinctly described in the comments by Hon. Sylvia Pressler to the present Rule:

[N]one of the commitment forms prepared by the Department of Institutions and Agencies (correctly designated Department of Human Services by the 1978 amendment) and approved by the Administrative Office of the Courts prior to the adoption of the 1975 rule required any such specific statement in the physician's certificate or forms of orders and, in fact, both temporary and final commitment orders were routinely entered without the finding of probable danger either made or noted. This provision of the rule was significantly modified by the 1976 amendment.

S. Pressler, New Jersey Court Rules, comments to Rule 4:74-7, p.919, paragraph 3 (1985).

solely on mental illness.<sup>19</sup>

Contrary to the government's assertion, New Jersey law did not require an adjudication of dangerousness when a

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<sup>19</sup> This Court has recognized the dangers of such a limited inquiry without more:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.

Addington v. Texas, 441 U.S. 418 (1979)

commitment of a previously voluntary patient was sought. The government suggests that Galioto's commitment required a judicial finding that there "exist[ed] in the patient a diagnosed mental illness of such degree and character that the person, if discharged, [would] probably imperil life, person or property . . .," citing N.J.S.A. 30:4-48 (West 1981). This both misconstrues that statute and misrepresents the law in New Jersey at the time of Galioto's commitment.

N.J.S.A. 30:4-48 governs where a patient who has voluntarily committed himself subsequently seeks to be discharged and indicates the circumstances under which application to a court for involuntary commitment can be made.

The relevant statutory provision reads:

When discharge has been  
requested by or on behalf  
of any patient above



described [voluntary], and when, in the judgment of either the chief executive officer or the chief of service when so designated, or the medical director, together with the patient's attending physician in the hospital, there is believed to exist in the patient a diagnosed mental illness of such degree and character that the person, if discharged, will probably imperil life, person or property, either the chief executive officer or the chief of service or attending physician, shall make application to the court for an order authorizing hospitalization of the patient as provided for in this Title.

[N.J.S.A. 30:4-48]  
(emphasis added).

Thus, the statute merely sets forth what the medical staff must have believed to initiate the proceeding. The statutory criteria would be satisfied even if the individual were not believed to present "a danger to himself or others," O'Connor v. Donaldson, 422 U.S. 563, 576 (1975), for the statute only requires that the

individual "will probably imperil ... property." N.J.S.A. 30:4-48 (emphasis added).<sup>20</sup> The statute does not govern the findings required by the court to whom the application for involuntary commitment is made. Those findings in 1975 were governed by court rules which did not require a finding of dangerousness before commitment could be ordered. Additionally, the statute cited by the Government only applies to those few patients who were converted from voluntary to involuntary status, and not to the great majority of patients who are, and were in 1971, admitted involuntarily from the outset.

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<sup>20</sup> Danger to property seems to have been the precipitating factor for Galito. See, supra, at 26, n.17.

The procedural realities of civil commitment until recently are such that civil commitment of Galioto and thousands of other New Jersey citizens can hardly be considered an adjudication in any sense.<sup>21</sup> Due process protections, imposed on the initiative of the New

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<sup>21</sup> The standard of proof for civil commitment in New Jersey, previously a "preponderance of the evidence," is now "clear and convincing." See, In re Scelfo, 178 N.J. Super. 394 (App. Div. 1979) adopting Addington v. Texas, 441 U.S. 418 (1979).



Jersey Supreme Court,<sup>22</sup> now require that an actual hearing be held concerning civil commitment and that the patient be present at the hearing and provided with adequate notice and,

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<sup>22</sup> New Jersey's civil commitment statute, N.J.S.A. 4:30-23 et seq., enacted in 1965, forms the foundation for the process, and has remained relatively unchanged for the past twenty years. The Rules of Court which implement the process have been radically modified. The Court Rule 4:74-7, entitled "Commitment of Insane," in existence in 1971 [hereinafter the "1971 Rule" and attached at P-1a] was supplemented by a directive by New Jersey Supreme Court Chief Justice Richard J. Hughes in 1974 [hereinafter the "Directive" and attached at P-4a]. In 1976, the 1971 rule and the Directive were supplanted by the present Court Rule, entitled "Civil Commitment," governing civil commitment procedure which provided additional due process safeguards [attached at P-8a]. As a result of these changes, persons in New Jersey are no longer subject to involuntary hospitalization without a finding of danger to self or others, without counsel or without a hearing. These changes in practice support the District Court's determination that the statutory scheme is irrational and unconstitutional.

finally, that the patient be represented by court-appointed counsel at the hearing concerning commitment.<sup>23</sup>

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<sup>23</sup> The reasons for these changes were described as follows by the New Jersey Supreme Court when the greatly expanded procedural due process protections were instituted in 1975:

A general revision of the rule [governing civil commitment] was clearly required in order to correct a long-standing history of procedural abuses in the civil commitment process and to insure that no person may be involuntarily committed to a psychiatric institution without having been afforded full procedural due process. The adoption of this rule reflects an increasing national and state-wide concern for the situation of persons suffering from mental illness and a growing realization that, traditionally, persons alleged to be suffering from mental illness have been involuntarily committed on ex parte orders entered without representation by counsel, without adequate notice, without adequate proofs, and generally in violation of the most fundamental concepts of due process. See, generally, Note, Developments in the Law - Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974).

(footnote cont'd. on following page)

Prior to 1976, hearings regarding civil commitment were the exception rather than the rule.<sup>24</sup> Patients were provided with a maximum of one day's notice of the hearings,<sup>25</sup> with a provision instructing the patient to respond if he or she objected to the commitment.<sup>26</sup> "[I]f there was no

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(footnote cont'd. from previous page)

See also, O'Connor v. Donaldson, 43 U.S. Law Week, 50 (June 24, 1975); In the Matter of the Application for the Commitment of Geraghty, 68 N.J. 209 (1975).

S. Pressler, New Jersey Court Rules, Comment to Rule 4:74-7, paragraph 1.

<sup>24</sup> This point was briefed more extensively in the Brief of the New Jersey Public Advocate as Amicus Curiae in Support of Respondent, filed October 7, 1985.

<sup>25</sup> 1971 Rule 4:74-7(e) [P-1a-2a].

<sup>26</sup> The required written notice contained a provision that "... if the patient desires to oppose the application for a final judgment of commitment, he may appear personally or by attorney at the time and place fixed for the final hearing." 1971 Rule 4:74-7(e) [P-1a].



response to the notice of hearing, then a final order was routinely signed on an ex parte basis." S. Pressler, New Jersey Court Rules, comment to R.4:74-7, paragraph 6. This order was entered traditionally on the basis of certifications made in the application for temporary commitment. As a result, individuals were committed without having been before the court, without examination by a psychiatrist, and without adequate notice of the proceedings.

This record provides the Court with a classic example of this procedure. The record contains the "Certificate for Hospitalization" executed by Galioto's wife, J.A. 3-4, the Certificate of Mental Illness executed by Ronald J. Alvarez, M.D., J.A. 5-6, and a "Final Order of Commitment" entered May 31, 1971. J.A. 7. These forms<sup>27</sup>

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While it may not be apparent from the Appendix, each of these documents are pre-printed forms.

indicate that Galioto, like most persons subjected to involuntary treatment at the time, was found "... mentally ill and a proper person to be confined in one of the institutions for the mentally ill of this State," J.A. 7, on the basis of a report describing an evaluation where the psychiatrist concluded that Galioto's "... condition ... [was] such as to require evaluation, care and treatment in a mental hospital." J.A. 6. This hardly rises to the level of "proven mental illness" posed by the government.

Therefore it cannot be conclusively inferred, as the Department of Treasury would do, that a civil commitment is an adjudication of danger to self or to others. The Government's reliance on recent decisions of this Court describing the constitutional requirements of civil commitment only serves to demonstrate the need for administrative relief provisions so that

persons subject to unconstitutional procedures in the past may be afforded relief.

The rationality of linking civil commitment and dangerous mental illness becomes even more attenuated with the passage of time. Fifteen years have elapsed since Galioto's twenty-three day hospitalization at Fair Oaks Hospital. He has never been rehospitalized.

New Jersey has long recognized that the stigma of once having been institutionalized should not be a lifelong burden on its citizens. Under New Jersey law, a person may apply to the Superior Court for an order to expunge the records of commitment from the court. N.J.S.A. 30:4-80.9. Such relief is available to persons discharged as "... recovered, or whose illness upon discharge or subsequent thereto, is substantially improved or in substantial



remission ..." N.J.S.A. 30:4-80.8. Under state law, the effect of expungement is that "... the commitment shall be deemed not to have occurred and the petitioner may answer accordingly any question relating to its occurrence." N.J.S.A. 30:4-80.11. Thus, for purposes of State law, those who seek and secure expungement of their commitment records may legally deny that such commitment ever occurred once they have convinced a New Jersey court that they have "substantially improved or [are] in substantial remission." N.J.S.A. 30:4-80.8. They are thus relieved of lifelong stigma.

C. ASSUMING PAST COMMITMENT MAY PROPERLY OPEN AN INQUIRY INTO PRESENT MENTAL STATUS, NO RATIONAL DISTINCTION CAN BE MADE BETWEEN FORMER INVOLUNTARY PATIENTS AND CONVICTED FELONS

Assuming that past commitment may properly open an inquiry into present mental status, no rational distinction can be made between former involuntary patients and convicted felons. Congress' goal was to keep firearms out of the hands of what this Court has characterized as "categories of presumptively dangerous persons."<sup>28</sup> Lewis v. United States, 445 U.S. 55, 64 (1980). Both groups are subject to scrutiny under the Act by virtue of events in their past. The relevant inquiry here, however, is the goal to be served by

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<sup>28</sup> "The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" Huddleston v. United States, 415 U.S. 814, 824 (1974) quoting S. Rep. No. 1501, 90th Congress, 2d Sess. § 22 (1968).

permitting convicted felons to demonstrate that they "will not be likely to act in a manner dangerous to public safety," 18 U.S.C. 925(c), yet not permitting former mental patients the same opportunity.

It is not at all clear from the legislative history that Congress did not act more from emotion and prejudice than from a rational evaluation of mental illness. At one point in the debates, the question was raised as to whether the language of the bill should be "clarified to permit those who have been cured and had their rights as citizens restored to be eligible to acquire weapons." 114 Cong. Rec. 21805 (1968). The legislative history evidences no cogent explanation, let alone a rational one, for why the suggestion that the bill be amended "so that someone could be relieved of this disability" was not followed. See 114 Cong. Rec. 21805 (1968)



(remarks of Representative MacGregor).<sup>29</sup>

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The relevant exchange is inconclusive:

MR. SIKES: I note on page 16 of the bill, under subsection 4, it says in effect that a gun cannot be sold to a person who has been adjudicated in any court as a mental defective or committed under any court order to any mental institution.

There are those who have been committed to a mental institution who have subsequently been cured and have had their rights as citizens restored to them. Would not the gentleman feel that this language should be clarified to permit those who have subsequently been cured and had their rights as citizens restored to be eligible to acquire weapons?

MR. CELLER: Well, the case of an adjudicated mental defective presents a serious situation. I am not an expert on that; but we incline to the view that a mental defective should not be permitted to ship, transport or receive a gun or a lethal weapon.

MR. SIKES: But if the courts have declared he is no longer mentally defective in that he has been given back his rights as a citizen, it would appear he would be entitled to acquire a weapon.

MR. MACGREGOR: Mr. Chairman, will the gentleman yield?

MR. CELLER: I yield to the gentleman.

MR. MACGREGOR: That very point has been raised by a number of State officials and private medical doctors in the field of mental health. Again, I invite the attention of the gentleman from Florida to the draftsmanship of an amendment so that someone could be relieved of this disability as set forth in the bill.

[114 Cong. Rec. at 21805].

It appears that the amendment was not rejected, but merely overlooked.

Lacking any basis in the legislative history for the differential treatment of former mental patients and convicted felons, the government offers post hoc rationalizations for that differential treatment.<sup>30</sup> First, it maintains that no

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<sup>30</sup> Although language was proposed, it does not appear that action was ever taken on it. See, 114 Cong. Rec. 27150 (1968).

Although enactments of Congress are entitled to a presumption of constitutionality and a party challenging a legislative classification has the burden of demonstrating its irrationality, the rational-basis standard "is not a toothless one," Matthews v. Lucas, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764, 49 L.Ed. 2d 651 (1976). The standard will not be satisfied simply by flimsy or implausible justifications for the legislative classification, proffered after the fact by government attorneys. See, e.g., Jimenez v. Weinberger, 471 U.S. 628, 84 S.Ct. 2496, 41 L.Ed. 2d 363 (1974); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed. 2d 782 (1973); U.S. Dept. of Agriculture v. Murray, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed. 2d 767 (1973); James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed. 2d 600 (1972).

justification for the differential treatment is required because the administrative relief at issue is "withheld from virtually all of the categories of 'presumptively dangerous persons' that are subjected to permanent disability by the Gun Control Act." Government's brief at 14. Second, the government contends that the uncertain and evolving nature of psychiatry precludes a prediction with a necessary degree of certainty that a person committed under the constitutionally-mandated determination by clear and convincing evidence of danger to self or others would not pose a similar threat in the future. Government's brief at 19-21. These two justifications will be addressed in turn. Neither provides the rational basis required to pass constitutional scrutiny.



CCNTRARY TO THE GOVERNMENT'S  
ASSERTIONS, THE STATUTE DOES  
SINGLE OUT FORMER MENTAL  
PATIENTS FOR SPECIAL UNFAVORABLE  
TREATMENT.

In its attempt to rehabilitate Congress' irrational treatment of the previously committed, the Government asserts that the previously committed are not the only ones subjected to the permanent disability of the firearms law. Others who the Government maintains are similarly permanently disabled are felons who commit firearms violations or crimes involving the use of firearms or other weapons, 18 U.S.C. secs. 922(d)(1), (g)(1) and (h)(1), 18 U.S.C. App. 1202(a)(1), persons who are discharged from the armed forces under dishonorable circumstances, 18 U.S.C. App. 1202(a)(2), persons who have renounced their United States citizenship, 18 U.S.C. App. 1202(a)(4), and illegal aliens, 18 U.S.C. 1202(a)(5).

The extent of the disability imposed on these other groups is not as permanent

as the Government suggests.

Section 925(c) does not, on its face, apply to felons convicted of firearms violations, dishonorably discharged veterans, persons who have renounced their citizenship and illegal aliens.<sup>31</sup> It specifically applies to persons under indictment or convicted of crimes punishable in excess of one year.<sup>32</sup> From 1980

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<sup>31</sup> Those groups as listed in Title VII, rather than Title IV.

<sup>32</sup> According to the Government's brief, the BATF will provide administrative relief to persons who have been dishonorably discharged due to the commission of a felony. G.B. at 15, n.9. This application of the statute certainly reduces the persuasiveness of the characterization of the dishonorably discharged as "dangerous" or "especially risky."

to January of 1985, its provisions have been successfully invoked by over 3,500 individuals,<sup>33</sup> hardly a "...narrow sub-category of felons." Government's brief at 15.

The Government suggests that these groups are as permanently disqualified as those who have been formerly committed. However, no other group affected by firearms disqualifications are subject to the permanent prohibition imposed on persons who have

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<sup>33</sup> See, 50 Fed. Reg. 1026 (Jan. 8, 1985); 49 Fed. Reg. 48252 (Dec. 11, 1984); 49 Fed. Reg. 35707 (Sept. 11, 1984); 49 Fed. Reg. 29503 (July 20, 1984); 49 Fed. Reg. 25060 (June 19, 1984); 48 Fed. Reg. 50977 (Nov. 4, 1983); 48 Fed. Reg. 36720 (Aug. 12, 1983); 48 Fed. Reg. 29650 (June 27, 1983); 48 Fed. Reg. 28385 (June 21, 1983); 48 Fed. Reg. 10508 (March 11, 1983); 47 Fed. Reg. 47714 (Oct. 27, 1982); 47 Fed. Reg. 10132 (March 9, 1982); 46 Fed. Reg. 57812 (Nov. 25, 1981); 46 Fed. Reg. 46456 (Sept. 18, 1981); 46 Fed. Reg. 33411 (June 29, 1981); 46 Fed. Reg. 23646 (April 27, 1981); 46 Fed. Reg. 11751 (Feb. 10, 1981); 45 Fed. Reg. 76838 (Nov. 20, 1980); 45 Fed. Reg. 65393 (Oct. 2, 1980); 45 Fed. Reg. 49733 (July 25, 1980).



been committed to mental institutions:

1. With respect to illegal aliens and fugitives, the disability and presumed risk of dangerousness disappears with the resolution of legal status whether conviction, deportation or citizenship.

2. Persons dishonorably discharged from the armed services are eligible for the administrative relief provisions if the discharge resulted from the commission of a felony. Government's brief at 15, n.9.

3. Persons using or addicted to narcotic or stimulant drugs need only recover from the addiction to resume eligibility, as the plain language of the statute merely proscribes sales to a person "...who is an unlawful user of or addicted to..." certain drugs. 18 U.S.C. § 922(d), (f), (h).

4. The legislative history even suggests that Congress assumed that the disqualification occasioned by a renunciation

of citizenship or dishonorable discharge was reversible by Presidential pardon.<sup>34</sup>

5. Even a convicted firearms violator has at least three avenues available to remove his disability under the statute: (a) reversal of his conviction on the merits, see, Lewis v. United States, supra, 445 U.S. at 61, n.5; (b) successful collateral attack on his conviction, see id. at 67; and (c) a Presidential pardon. Id. at 61. See, 27 C.F.R., Sec. 178.142.<sup>35</sup>

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<sup>34</sup> Senator Long conceded the possibility that the President of the United States could restore to one who had renounced his citizenship or been dishonorably discharged the right to purchase a firearm. 114 Cong. Record at 14773. There is no expectation that the President could declare someone no longer mentally ill.

<sup>35</sup> Even indictment does not immediately result in firearms disqualification. A licensee may "...continue operations pursuant to his existing license during the term of such indictment and until any conviction pursuant to the indictment becomes final ..." provided that the fact of the indictment is disclosed in any renewal application. 27 C.F.R. Sec. 178.143.

Finally, the Government argues that the administrative relief provisions were inspired by the drastic effect that the felony disability provision had on corporate firearms manufacturers. Government brief at 15-16. This is not supported by legislative history, the language of the statute, or its implementing regulations. The relief provision extends not merely to firearms dealers and manufacturers, but applies to all convicted felons whose crime did not involve weapons.

An administrative relief provision -- the predecessor of sec. 925(c) -- was first enacted in 1965. As initially enacted, this provision was intended to provide relief to licensed firearms manufacturers who had committed felonies wholly unrelated to their firearms business. See, S.Rep. 666, 89th Cong., 1st Sess. 2-3 (1965). Congress subsequently extended the relief provision beyond the business



context, enacting the current "not [be] likely to act in a [dangerous] manner" standard.<sup>36</sup> See, H.R. Cong. Rec. 1956, 90th Cong., 2d Sess. 33 (1968). Whatever the original motivation for the administrative relief provision, that provision now extends to all convicted felons, except those convicted of firearms offenses.<sup>37</sup>

In those cases in which this Court has construed the felony conviction disability, it has noted on several occasions

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<sup>36</sup> Under the Government's own regulations, "[a]ny person" may make application for relief from the disabilities under federal law incurred by reason of a conviction of a crime punishable by imprisonment for a term exceeding 1 year if such conviction was not a crime involving the use of a firearm or other weapon or a violation of the Act or the National Firearms Act." 27 C.F.R. sec. 178.144(a).

<sup>37</sup> At the same time, Congress specifically exempted certain white collar crimes from its definition of "crime[s] punishable by imprisonment for a term exceeding one year. See, 18 U.S.C. 921(a)(20).

the important feature of relief provided by the statutory scheme. Thus, for example in Dickerson v. New Banner Institute, Inc., supra, the Court observed that "[a]ny potential harshness of the federal rule is alleviated by the power given the Secretary to grant relief where relief is appropriate based on uniform federal standards." 103 S.Ct. at 995. Similarly, in Lewis v. United States, supra, 100 S.Ct. 915, 920, the Court noted, "Finally, it is important to note that a convicted felon is not without relief."

In contrast to the convicted felon, the former mental patient has no opportunity to remove his disbarment. Whereas the convicted felon has the ability on direct appeal to demonstrate the erroneousousness of that conviction, the mental patient lacks such an opportunity. It was not until recently that patients were afforded counsel for an appeal. See,

supra at 34. <sup>38</sup> A collateral attack upon the commitment such as an order for expungement would not necessarily invalidate the original commitment so as to satisfy federal law. New Banner, supra, at 993. Thus, there is no guarantee that even if such litigation were undertaken, that the person would satisfy the present federal requirement. Unlike the New Banner application, he has no alternate federal

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<sup>38</sup> RESERVED



forum to argue his present qualifications.<sup>39</sup>

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<sup>39</sup> Withholding from former mental patients the administrative relief available to convicted felons is particularly unfair in light of the changing concepts of mental disorders. A person adjudicated to have been suffering from what may have been considered a mental disorder twenty years ago is permanently prevented from purchasing a firearm even though that very same condition may no longer be considered to constitute a disorder. Cf., Hill v. United States Immigration and Naturalization Service, 714 F. 2d 1470, 1472 (9th Cir. 1983) (under change in Public Health Service policy, homosexuality no longer considered a psychopathic personality, sexual deviation or mental defect sufficient to deny alien medical certificate for entry into United States). Similarly, other changes in accepted clinical diagnostic criteria affect the diagnosis given, and thereby the psychiatrist's decision to seek hospitalization. See, Westermeyer and Harrow, Prognosis and Outcome Using Broad (DSM II) and Narrow (DSM III) Concepts of Schizophrenia, 10 Schizophrenia Bulletin 624 (1984); Emergency Psychiatry Concepts, Methods and Practices, 93-94 (1984).

The Government's finally asserts that the "uncertain and evolving" nature of psychiatry makes predictions of future dangerousness in persons with a history of commitment insufficiently precise to warrant administrative relief equivalent to that afforded convicted felons. As the District Court noted, it is disingenuous indeed to subject an individual to loss of liberty and lifelong stigma on the basis of psychiatric opinion while denying a person the opportunity for relief from disparate treatment because that evidence is unreliable. This Court has recognized that the unreliability of psychiatric opinion may support, rather than reduce, the need for a hearing:

The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings.

Vitek v. Jones, 445 U.S. 480, 495 (1980)  
quoting Addington v. Texas, supra, 414  
U.S. at 430.

Amici certainly do not argue that psychiatrists alone should make the final determination of whether a former patient may safely handle a firearm. Like the convicted felon seeking administrative relief, a former patient should be able to offer ". . . such supporting data as the applicant deems appropriate." 27 C.F.R. § 178.144(b). While this might include (and probably would) psychiatric evidence, that opinion alone need not decide the ultimate issue for the Government.<sup>40</sup>

The unreliability of psychiatric diagnosis is not a sufficient basis to deny an equal opportunity to

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<sup>40</sup> See, e.g. 20 C.F.R. § 404.1527 (physician's conclusion of disability insufficient for Social Security benefits).

demonstrate rehabilitation. The Government misapprehends the nature of the studies which gave rise to the conclusion that psychiatrists are unreliable predictors of dangerous behavior. Studies show that psychiatrists over-predict dangerousness by as much as 70%. See, Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Calif. L.Rev. 693, 714 (1974). Accordingly, since such opinions of capacity to safely handle firearms are conservative, rather than optimistic, the Government's argument that the uncertain nature of psychiatry justifies the total ban on firearms for former patients is plainly incorrect.

The Government's arbitrary refusal to confront the issue of mental competence is in direct conflict with the state gun control provisions the legislation was intended to support. The New Jersey gun control scheme relies on the use of a "firearms purchaser identification card," necessary



for lawful acquisition or disposition of a weapon. N.J.S.A. 2C:58-3. Citizens of New Jersey of "...good character and good repute in the community in which they live..." are entitled to such a card unless they fall within the following categories:

(1) . . . any person who has been convicted of a crime, whether or not armed with or possessing a weapon at the time of such offense;

(2) . . . any drug dependent person as defined in P.L. 1970, c. 226 (C. 24:21-2), . . . any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or . . . any person who is presently an habitual drunkard;

(3) . . . any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, . . . any person who has ever been confined for a mental disorder, or . . . any alcoholic unless any of the foregoing persons produces a certification of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that

would interfere with or handicap him in the handling of firearms;  
. . . any person who knowingly falsifies any information on the application form for a handgun purchase permit or firearms purchaser identification card;

(4) . . . any person under the age of 18 years; or

(5) . . . any person where the issuance would not be in the interest of the public health, safety or welfare.

N.J.S.A. 2C:58-3(c). Persons aggrieved by the denial of an identification card may request a hearing before a judge of the Superior Court. N.J.S.A. 2C:58-3(d).

The New Jersey procedure is far more comprehensive than the federal scheme, and, through this comprehensiveness, better directed toward evaluating present capacity to handle a weapon. Applicants must disclose not merely whether they have been adjudicated mental defective or have been committed to a mental

hospital, but whether:

. . . he has ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, giving the name and location of the institution or hospital \* and the dates of such confinement or commitment, whether he has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric condition, giving the name and location of the doctor, psychiatrist, hospital, or institution and the dates of such occurrence . . .

N.J.S.A. 2C:58-3(d).

Anthony Galioto complied with these provisions. His application was granted on April 27, 1981. J.A. 14. Under New Jersey law, he is competent to possess a firearm. Only the federal statute precludes him from exercising this right. Amici submit that the statutory scheme which denies him the opportunity denies him equal protection of law.

## IV. CONCLUSION

For the foregoing reasons, amici  
submit that the order of the District  
Court should be affirmed.

Respectfully submitted,

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Date: February 10, 1986

APPENDIX

4:74-7. COMMITMENT OF INSANE<sup>1</sup>

(a) Definitions.

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(b) Form of Application. An action for [the] commitment...shall be commenced by filing an application in writing to which shall be attached the certificate in writing of 2 physicians. Forms in commitment proceedings shall be those prescribed by the Department of Institutions and Agencies, subject to the approval of the Administrative Director of the Courts.

(c) Fixing Time for Hearing.

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(d) Order of Temporary Commitment.

\*\*\*

(e) Notice. If the patient is not confined in an institution before the final

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<sup>1</sup>Source: Rules Governing the Courts of the State of New Jersey (1971 ed.)

hearing, the applicant shall personally serve upon the patient or his attorney written notice of the time and place of final hearing, at least one day before the date fixed. If the patient is confined in an institution before the final hearing, the county adjuster shall serve upon the patient personally a written notice of the time and place of final hearing, at least one day before the date fixed.... The notice shall contain a statement that if the patient desires to oppose the application for a final judgment of commitment, he may appear personally or by attorney at the time and place fixed for the final hearing.

(f) Hearing.

\*\*\*

(g) Final Judgment at Commitment. After the proofs have been taken and the matter heard (whether before or after the temporary commitment of the patient as provided by

law), and if the court finds the person to be insane and a proper person to be confined in one of the institutions for the insane in the State, it shall make a final judgment of commitment. The judgment shall contain a determination of insanity, the names of the certifying physicians, and a recital of the notices of inquiry given and shall designate the place to which the patient shall be finally confined until restored to reason or discharged or until the further order of a court of competent jurisdiction....



November 12, 1974

MEMORANDUM TO: All Assignment Judges,  
Trial Court Admin-  
istrators and County  
Clerks

FROM: Chief Justice Richard J.  
Hughes

RE: Involuntary Civil Commitment  
Proceedings

A study recently conducted by the Administrative Office of the Courts indicates that there is a lack of uniformity among the counties in regard to the docketing procedures being followed in civil commitment cases. A great divergence of practice occurs in involuntary proceedings, where in many instances, papers are not filed until after the final judgment of commitment. (See N.J.S.A. 30:4-56). In addition, lack of adequate docketing procedures has permitted uncontrolled administrative adjournments so the court does not have a written record of the patient's confinement. When notice is filed in the County Clerk's Office,

5a

no docket number has been assigned for further control.

In order to standardize procedures throughout the State, all involuntary civil commitment cases shall be handled in the manner described below.

1. DOCKETING

\*\*\*

2. ASSIGNMENT OF CASES

\*\*\*

3. SCHEDULING OF CASES

\*\*\*

4. WRITTEN NOTIFICATION OF HEARING

...Written notification shall be served personally upon the patient in accordance with N.J.S.A. 30:4-41.

In all instances mentioned above, written notification shall be transmitted no later than 5 days prior to the date of the hearing.

5. ADJOURNMENT POLICY

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6. CHANGE IN PATIENT'S STATUS

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7. PERIODIC REVIEW

\*\*\*

8. PATIENT'S RIGHT TO APPEAR

It shall be the responsibility of the Assignment Judge to assure that in all instances in which a hearing has been scheduled, that the patient be given every opportunity to appear. If the medical director or chief of service of the mental hospital feels that in his expert opinion it would be prejudicial to the health of the patient, or unsafe to produce the patient at the inquiry, then it shall be the obligation of the medical director or chief of service to certify in writing to the court his expert opinion concerning the patient's inability to appear, setting forth the facts supporting his conclusion. The hearing judge shall evaluate any certification submitted and determine

7a

whether the personal appearance of the patient is feasible. (See N.J.S.A. 30:4-41).

The policy and procedures set forth in this memorandum shall take effect immediately.

cc: County Counsels  
County Adjusters  
Department of Institutions  
and Agencies



4:74-7. CIVIL COMMITMENT<sup>3</sup>

(a) Definitions.

\*\*\*

(b) Commencement of Action. ...If the patient is an adult, the certificates shall state with particularity the facts upon which the physician relies in concluding that the patient if not committed would be a probable danger to himself or others or property...

(c) Temporary Commitment.

\*\*\*

(d) Discovery.

\*\*\*

(e) Hearing. No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral

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<sup>3</sup> Source: Rules Governing the Courts of the State of New Jersey (1985 ed.).

testimony of at least one psychiatrist licensed in any one of the United States who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se. (Emphasis added).

(f) Final Judgment of Commitment,  
Review.

The court shall enter a judgment of commitment to an appropriate institution if it finds from the evidence presented at the hearing that the institutionalization of the patient is required by reason of his being a danger to himself or others or property if he is not so confined and treated ...

(g) Judgment of Release.

\*\*\*

(h) Legal Settlement.

\*\*\*

(i) Filing.

\*\*\*

(j) Institutionalization of Minors.

\*\*\*

**AMICUS CURIAE**

**BRIEF**



Supreme Court, U.S.

F I L E D

FEB 13 1986

JOSEPH F. SPANIOL, JR.  
CLERK

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NO. 84-1904 (9)

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In The  
**Supreme Court of the United States**

October Term, 1985

---

UNITED STATES DEPARTMENT  
OF THE TREASURY, BUREAU OF ALCOHOL,  
TOBACCO AND FIREARMS,

*Appellant,*

vs.

ANTHONY J. GALIOTO,

*Appellee*

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY

---

BRIEF AMICUS CURIAE OF THE COALITION  
FOR THE FUNDAMENTAL RIGHTS  
AND EQUALITY OF EX-PATIENTS  
IN SUPPORT OF APPELLEE

---

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**STATEMENT OF  
INTEREST OF AMICI CURIAE**

This case presents the question of whether a federal firearms statute may discriminate against former mental patients by denying them forever the opportunity to prove their recovery and rehabilitation for the purpose of keeping and bearing arms while permitting convicted felons to do so. The amici curiae, <sup>1/</sup> participants in the Coalition for the

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<sup>1/</sup> The participants in the Coalition for the ~~FREE~~ are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion

## Fundamental Rights and Equality of Ex-Patients (the

of mental health and the prevention of mental illnesses.

### NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION

The National Mental Health Consumers Association was organized in Baltimore, Maryland in June, 1985, as a national representative voice for mental health consumers and charged with developing national forums so that the concerns of mental health consumers can be heard.

### ON OUR OWN, INC. OF BALTIMORE, MARYLAND

On Our Own, Inc. of Baltimore, Maryland was founded in 1981 and incorporated as a Maryland non-profit corporation in 1982. On Our Own is a mutual support and advocacy organization of individuals who have spent time in psychiatric facilities and have joined together to advocate for the rights of all present and former mental patients.

### SHARE OF DAYTONA BEACH, FLORIDA, INC.

SHARE of Daytona Beach, Florida, Inc., organized in Daytona Beach in January, 1980, was incorporated in November, 1985 as a non-profit corporation in the State of Florida. SHARE's primary thrust is the rights of mental patients and former mental patients.

### THE MENTAL PATIENT'S ASSOCIATION OF NEW JERSEY

The Mental Patient's Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self-help organizations devoted

"Coalition for the FREE"), are all organizations concerned about promoting public understanding of mental health issues and protecting the rights of the mentally ill and of present or former mental patients. Members of these organizations include many former patients, their families, and friends, as well as advocates for the mentally ill.

This case represents one of a number of issues of ex-patients' rights which are concerns of the

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to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

### THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

### THE MANDALA GROUP

The Mandala Group, formed in November, 1983 in Billings, Montana, is an ex-mental patient self-help and political action group, organized for the purposes of fighting discrimination and stigma and influencing legislation for the rights of mental patients.

participants in the Coalition for the FREE. Full participation by ex-patients as citizens means guaranteeing their equal rights to housing, employment, public services, and the rest of the panoply of benefits of our society. The Coalition for the FREE opposes all systematic denial of any rights, privileges, licenses, permits, or other official or unofficial indicia of equal status to American citizens solely on the basis of their status as former mental patients.

The right to keep and bear arms by ex-patients admittedly is an emotion-charged and difficult issue to many, but equality in community-based housing and fair employment for ex-patients is just as emotion charged and difficult to others. Amici curiae, participants of the Coalition for the FREE, did not choose to litigate the issue of their right to be fairly treated as to their right to keep and bear arms. This case, however, has come before this Court nevertheless. Thus, amici curiae seek to be heard on this issue because of the potential precedential impact

of this case on federal and state laws involving the right to keep and bear arms as well as other rights of former mental patients. The issues covered by this brief amicus curiae will consider matters relevant to this Court's deliberation not otherwise presented by the parties or other amici, including research on discrimination against former mental patients, current studies on predicting violence and dangerousness, the historical origins of the Second Amendment, American and English legislative history, and comparative law on the issue of past mental illness and the right to keep and bear arms.

## II. SUMMARY OF ARGUMENT.

In Galioto v. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, 602 F. Supp. 682 (D.N.J. 1985), the district court properly invalidated the section of the federal firearms law that prohibits all former committed mental patients from ever being able to prove their recovery so as to overcome their statutory disability to have firearms. By assuring that



even convicted felons have the possibility of being rehabilitated for the purpose of acquiring firearms, while totally denying such rehabilitation to former mental patients, the federal statutes are a classic example of the irrational discrimination that still exists against many former patients' fundamental rights. The legislative history of the statute and the available scientific research demonstrate the lack of any rational basis for this discrimination.

The federal law improperly deprives from former patients forever of one of the most fundamental individual rights of Americans. This right was specifically guaranteed by the English Bill of Rights and therefore existed long before the federal and state constitutional provisions guaranteeing this individual right to keep and bear arms under our laws. Because of the historic "fundamentality" of this right and because of its relationship to securing and protecting other constitutional rights, under this Court's equal protection decisions, the highest level of judicial scrutiny must be applied to this statutory

scheme. As the court below found, however, since the statute fails even the rational basis test, a fortiori, it fails the higher test.

Accordingly, the district court opinion striking down the federal firearms law as irrationally discriminatory against former mental patients must now be affirmed by this Court to ensure full legal equality to former patients for this and all of their other constitutional and fundamental individual human rights. Otherwise, if the Galloto decision is reversed and the discriminatory federal firearms law upheld, this precedent would affect all former patients' rights, not only in this area but with regard to their other important rights and privileges as well.

### **III. ARGUMENT**

#### **A. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THERE IS NO RATIONAL BASIS FOR THE DISCRIMINATION AGAINST EX-PATIENTS IN 18 U.S.C. §925(c)**

##### **1. The Judgment Below was Correct**

The district court properly concluded that 18 U.S.C. §925(c), by its complete denial of former

patients' ability to prove recovery so as to acquire firearms, violated equal protection guarantees. 602 F. Supp. at 691. The basis for the district court's holding was that the statute improperly failed to provide any opportunity for rehabilitation for former patients while providing for such rehabilitation of felons. Id. Despite the Government's attempts to characterize the decision as invalidating the entire disability provision (Government brief at 29-32), the district court repeatedly emphasized the limited scope of its ruling as affecting only those sections which disqualify former mental patients from firearms ownership. See 602 F.Supp. at 691: "The court can only declare those provisions of 18 U.S.C. §921 et seq. which have been used to deprive plaintiff of his ability to purchase a firearm . . . to be void as violative of the fifth amendment of the United States Constitution." See also, 602 F.Supp. at 683.

The district court also found that the statutory class of former mental patients was a "quasi-suspect" class justifying an intermediate level of scrutiny. 602

F. Supp. at 687. Since the statute lacked even a rational basis, however, the district court's opinion did not rely on the "quasi-suspect" class holding. Id.

The district court was correct in both respects, i.e., as to the "quasi-suspect" nature of the discriminatory classification of "former mental patients" and as to the lack of even a rational basis for the discrimination against former patients in the firearms statute.

## 2. The Characteristics of the Discrete Class of Former Mental Patients

Historically, those committed to mental institutions in New Jersey and elsewhere have been both isolated and neglected.<sup>2/</sup> The "stigma" or "label"

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<sup>2/</sup> In re Grady 85 N.J. 235 (1981); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Addington v. Texas, 441 U.S. 418, 425-6 (1979); and Parham v. J.R., 442 U.S. 584, 600 (1979).

See also Staff Report on the Institutionally Mentally Disabled Requested by Senator Lowell P. Weicker, Jr., Prepared for Joint Hearings by the U.S. Senate Subcommittee on the Handicapped, Committee on Labor and Human Resources and the Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Committee on Appropriations, April 13, 1985.

of having been committed to a mental institution follows former patients into the community where many former patients have now been relegated to their own "ghettoes" because of the difficulty of locating community group homes in residential neighborhoods,<sup>3/</sup> and to other treatment indicative of an "underclass."<sup>4/</sup> Virtually every aspect of discrimination that has been visited upon other "suspect" or "quasi-suspect" racial, religious, and gender-based groups can also be seen in its own special analogue unique to this underclass: "former mental

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<sup>3/</sup> See, e.g., J.W. v. City of Tacoma, 720 F.2d 1126, at 1129 (9th Cir. 1983). See also Note, "Mental Illness, A Suspect Classification," 83 Yale L. J. 1237 (1974). One recent study of nearly 1,000 homeless people in one state documented that 30% had had a history of psychiatric hospitalization. D. Roth, J. Bean, N. Lust and T. Saveanu, Homelessness in Ohio: A Study of People in Need 1985, at 134. Similarly, another earlier study in New York found one third of a random sample of the homeless among 107 shelters had had prior psychiatric hospitalizations. New York State Office of Mental Health, Who are the Homeless?, (1982) at p. 13.

<sup>4/</sup> See, e.g., Plyler v. Doe, 457 U.S. 202, at 234 (1983) (Blackmun, J., concurring).

patients."<sup>5/</sup> The issue of equal entitlement to licenses and privileges for former patients is clearly just one aspect of this historic discrimination.<sup>6/</sup> The discrimination against former mental patients touches every important aspect of their daily lives, including where they live,<sup>7/</sup> their ability to find work,<sup>8/</sup> or to

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<sup>5/</sup> See n. 3 above.

<sup>6/</sup> See, as examples of license conditions or rights limited by mental disabilities or illness: 75 Pa. C.S.A. §1503(4) (driver's license); 63 P.S. §421.15 (physician's license); 63 P.S. §224(2) (nurse's license); 10 U.S.C. §504 (enlistment in armed forces).

<sup>7/</sup> A number of recent studies have documented the public reaction against community psychiatric facilities and group homes. See, e.g., Rabkin, "Community Attitudes and Local Psychiatric Facilities," in The Chronic Mental Patient, Five Years Later, at p. 325 (J. Talbott ed. 1984); M.J. Dear and S.M. Taylor, Not on Our Street, Community Attitudes to Mental Health Care (1982); Baron and Piaseki, "The Community versus Community Care," in New Directions in Mental Health Services: Issues in Community Residential Care, No. 11 (R. Budson ed. 1981).

<sup>8/</sup> Former patients' problems in the area of employment have been particularly well documented and researched for decades. See, e.g., Olshansky, Grob and Malamud, "Employers' attitudes and practices in the hiring of ex-



obtain public benefits.<sup>9/</sup> Although some of the special

mental patients," 42 Mental Hygiene 391 (1958); Dightsman and Marks, "Employer attitudes toward the employment of the ex-psychiatric patient," 52 Mental Hygiene 562, (1968); Hartlage and Roland, "Attitudes of employers toward different types of handicapped workers," 2 J. Appl. Rehab. Coun. 115 (1971); Linds, "Mental Patient Status, Work and Income: An Examination of the Effects of a Psychiatric Label," 47 Am. Soc. Rev. 202 (1982). These difficulties have been addressed by Congress in the Rehabilitation Act of 1973, 29 U.S.C.A. §701 et seq., and its amendments. See Senate Report, No. 93-318, Senate Labor and Public Welfare Committee, 93rd Cong. 1st Sess., reprinted at 1973 U.S. Code, Cong. & Adm. News 2076, at 2078; Conf. Report No. 93-500, 93rd Cong. 1st Sess., reprinted at 1973 U.S. Code, Cong. & Adm. News at 2145. See also Doe v. Region 13 Mental Health - Mental Retardation Commission, 704 F.2d 1402, 1408 (5th Cir. 1983); Frazier v. Bd. of Trus. Nw. Miss. Reg. Med. Center, 765 F.2d 1278, 1288 (5th Cir. 1985). Nevertheless, one New Jersey study of former patients concluded that "scant attention" was being paid in the community to the employment needs of former patients and "[t]hat almost all patients were living at the edge of, or below, the poverty level." Mental Health Assoc. of Essex Co., From Back Wards to Back Streets: A Study of People in Transition from Psychiatric Hospitals to Community (1978) at p.2.

<sup>9/</sup> See, e.g., Slome, "The Need to Allow Subjective Evidence as Proof of a Mental Disability under the Social Security Act," 13 Rutgers - Cam. L.J. 649 (1982); Rubinstein, "SSA Issues New Rules Governing Mental Impairment Claims," 19 Clear. Rev. 715 (1985) and Mental Health Law Project, "Federal Practices

problems of former mental patients have been addressed heretofore, there may not yet have been as complete a record as now exists on these issues.<sup>10/</sup>

Discriminate Against the Mentally Ill, 15 Clear. Rev. 848 (1982)

<sup>10/</sup> In Addington v. Texas, 441 U.S. at 425-6, this Court noted:

Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

The Petitioner's Brief in Addington, at pp. 20-24, and the amici curiae brief in support thereof, at p.12, cited over a dozen studies from the period 1967 through 1976 on the issue of public attitudes toward, and fears of, the former patient. Subsequently, this Court, in Parham v. J.R., 442 U.S. 584, 601, n.13 (1979) cited the 1974 study now relied upon by the Government in its Brief, at p.26, for the proposition that stigma "is not a major problem for the ex-patient." The most recent and persuasive studies cited herein contradict this conclusion, however, and demonstrate the adverse impact that any further such "stigmatizing" and "labeling" may have on the housing and employment opportunities for former mental patients. As Justice Marshall recently commented, concerning similar issues involving



Despite this now longstanding documentation of their problems, the large class of former mental patients was without its own voice to confront and overcome the "stigma" or "labeling" of their condition and the public's extreme fears about their alleged dangerousness and violence. Others, parents and advocates, have undertaken to speak for the present and former mental patients and for fair treatment and understanding.<sup>11/</sup>

Only recently have self-help groups such as the former patient amici here, the Coalition for the FREE, and other former patient groups, begun their own organizations to provide their own political voice for these previously powerless, isolated and feared people.<sup>12/</sup>

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the mentally retarded: "Prejudice, once let loose, is not easily cabined." City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3247, 3267 (1985). (Marshall, J. concurring in the judgment in part and dissenting in part).

<sup>11/</sup> A current example is the recently passed legislation providing for a federally funded advocacy system for the mentally ill. See H.R. 3492, S.974, 99th Cong. 1st Session.

<sup>12/</sup> See, e.g., Anspach, "From Stigma to

This Court has long recognized the nature of the characteristics of suspect classes as related to these very same political issues. United States v. Carolene Products Co., 304 U.S. 144, 153, n.4 (1938). In its recent Cleburne opinion, this Court noted the impact on legislatures of the cause of the mentally retarded. See City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3257 (1985). The few court opinions that have touched upon or considered the suspect nature of statutory classes of former mental patients<sup>13/</sup> have all thus far predated the real impact of organized self-help advocacy groups of former patients such as amici. Any real political effects of such groups is therefore still yet to come, thereby

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Identity Politics: Political Activism Among the Physically Disabled and Former Mental Patients," 13A Soc. Sci. & Med. 765 (1979); See also Note, "Mental Disability and the Right to Vote," 88 Yale. L.J. 1644 (1979).

<sup>13/</sup> See, e.g., Schweiker v. Wilson, 450 U.S. 221, 231, n.12 (1981); Cospito v. Heckler, 742 F.2d 72, 83 (3rd Cir. 1984); J.W. v. City of Tacoma, 720 F.2d 1126, 1130 (9th Cir. 1983); Doe v. Colautti, 592 F.2d 704, 710-11 (3rd Cir. 1979).

satisfying any standard of political "powerlessness," especially in light of the already documented public fears of former patients.

### 3. Public Fears of Former Mental Patients

As former mental patients began to be released in large numbers <sup>14/</sup> back into the community,

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<sup>14/</sup> The appellee was an inpatient in a private psychiatric hospital for 23 days. 602 F. Supp. at 684. With regard to the length of his inpatient treatment, the nature of the facility and his involuntary commitment, the appellee is fairly typical of the class of "former mental patients" in this country. For example, in 1975, NIMH reported that 54% of admissions to state and county mental hospitals for inpatient care were for 28 days or less. National Institute of Mental Health, Characteristics of Admissions to Selected Mental Health Facilities (1975). An Annotated Book of Charts and Tables, at 99 DHH Pub. (ADM) 81-1005, Sup. of Doc. U.S. G. P.O., Wash., D.C. The percentage of admissions for less than one month to private hospitals was 66%. Id. NIMH reported that the median days of stay for 1975 was 25.5 days in state hospitals and 20.2 in private facilities. Id. at 96. For the same year, the NIMH Division of Biometry and Epidemiology estimated that in 1975 a total of 789,000 persons with mental disorders received treatment in state and county mental hospitals and 233,000 in private hospitals. The estimate for V.A. psychiatric hospitals was 351,000. Regien,

<sup>15/</sup> there have been widespread expressions of concern about their potential for "dangerousness" and violence. <sup>16/</sup> This public concern about

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Goldberg and Taube, "The De-facto U.S. Mental Health Service System," 35 Arch. Gen. Psych. 685, at 688 (1978). Types of commitment by legal status were not reported for that period in the 1970's, but the current percentages reported by NIMH in 1985 are that 51.1% of admissions to state and county facilities are involuntary, as are 12.5% of admissions to private hospitals. NIMH, Mental Health, United States, 1985 (Monograph in press) at p. 45. In short, based just on these statistics, the appellee is clearly one of at least several hundred thousand "former mental patients" potentially affected by the firearms statute. Moreover, estimates of the total number of Americans who are, or will be committed to mental hospitals have been as high as 10% of the total population. See n. 19 below as to the sources of this estimate.

<sup>15/</sup> See Steadman and Felson, "Self-Reports of Violence," 22 Criminology 321, at 322 (1984) (The authors date the problem as arising "since 1965 and the advent of massive deinstitutionalization programs").

<sup>16/</sup> See, e.g., J.W. v. City of Tacoma, 720 F.2d at 1129. See also, Steadman and Felson, "Self Reports of Violence," 22 Criminology 321 (1984) ("Media reports of ex-mental patients tend to focus on their involvement in violent crime and bizarre behavior." Id.). Steadman and Felson concluded:

According to these self-reports, ex-offenders engage most frequently in

former mental patients has stimulated many recent academic and scientific studies of such populations. <sup>17/</sup> Based on these studies, there is

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aggressive behavior at all levels of severity and are more likely to injure their antagonist. Ex-mental patients are more likely than the general population to use weapons and to be involved in hitting disputes, although the data in regard to hitting disputes were somewhat mixed. No differences were observed between ex-patients and the general population in the tendency to injure the antagonist or in the frequency of more mild forms of aggression. Thus ex-mental patients appear only slightly more likely to engage in the most serious forms of violence than the general population. The strong negative stereotype of them as dangerous and violent persons appears to be unsupported. Id. at 340.

<sup>17/</sup> The earlier studies have been summarized and criticized in two articles: Rabkin, "Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research," 86 Psychol. Bull. 1, 26 (1979) ("Based on the limited evidence available, I conclude that patients discharged from mental hospitals are not, by virtue of their psychiatric disorders or hospitalization experience, more prone to engage in criminal activity than are people demographically similar [who do not have such history]. . . ."); and Cohen, "Crime Among Mental Patients - A Critical Analysis," 52 Psych. Quar. 100 (Summer 1980) ("Until more carefully controlled studies are performed, we must be circumspect in imputing

simply no factual support for the "archaic" and

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any special degree of criminality to the discharged mental patient").

A more recent study by Rabkin concluded: "In the absence of definitive studies, it would be inappropriate to inform the public that discharged mental patients are indeed more dangerous than other people." Rabkin, "Dangerousness of Discharged Mental Patients: Public Beliefs and Empirical Findings," in The Community Imperative at p.39 (R. Baron, I. Ruman, B. Kiaczynska ed. 1980)

See also, for a more current survey of the literature, Tardiff, "Research on Violence," in The Chronic Mental Patient, Five Years Later at p.79 (J. Talbott ed., 1984).

The more current studies have also been considered in Slobogin, "Dangerousness and Expertise", 133 U.Pa. L.Rev. 97 (1984) ("One psychological factor that does not clearly correlate with violence is mental illness. Although the linkage between mental disorder and dangerousness is assumed to exist by the public, research indicates that prisoners do not appear to have higher rates of severe mental illness than demographically comparable groups in the community. Moreover, mentally ill patients do not appear to be any more violent than the non-mentally ill who have comparable histories of violent behavior." [citing J. Monahan, The Clinical Prediction of Violent Behavior (N.I.M.H. Monograph, 1981)] Id., at 120, n. 88. Professor Slobogin also notes the particular "false positive" rates of experts' predictions of dangerousness included in the leading studies. Id. at p. 110, n. 50.

Professor Monahan has since updated his original study. See Monahan, "The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy," 14 Am.J. Psych. 10 (1984).



"stereotypic" <sup>18/</sup> characterization of former patients as particularly dangerous or violent.

<sup>19/</sup> In particular, there is also simply no rational

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Again, Professor Monahan calls for further, more refined studies of the issue while criticizing the methodology of the work done thus far on predicting dangerousness.

In a recent television program concerning a well-publicized domestic crime committed by a recently released mental patient, the Columbia Broadcasting System aired a statement disclaiming any characterization of the dangerousness of the mentally ill: "[T]he majority of whom never commit a violent act. Indeed, they are not more prone to violence than the non-mentally disordered." CBS, "Murder by Reason of Insanity," Oct. 1, 1985. On the issue of the relationship between media coverage and the resulting public misconceptions about the mentally ill, see Steadman and Cocazzo, "Selective Reporting and the Public's Misconception of the Criminally Insane," 41 Pub.Op. Quar. 523 (1977-78)

<sup>18/</sup> J.W. v. City of Tacoma, 720 F.2d at 1129.

<sup>19/</sup> See Hardy and Stompoly, "Of Arms and the Law," 51 Chi-Kent L. Rev. 62, at 96-97 (1974). ("In addition to being ineffective, the use of prior commitment records may create serious inequities. Approximately 10% of all Americans will be committed at one time during their lives." (citing statement of A. Wiley at the Hearings on the Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, 87th

basis for discriminating against former patients regarding firearms while providing convicted felons with the opportunity for obtaining firearms. <sup>20/</sup>

The legislative history of Title I of the Gun Control Act of 1968 (which amended Title IV of the earlier Omnibus Crime Control and Safe Streets Act of 1958) is similarly devoid of any evidentiary rationale for disabling former patients. What the record of the hearings and floor debates does, in fact, document is the legislators' fear of those labeled "mentally ill", including both present and former patients, <sup>21/</sup> the overwhelming number of congressional

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Cong., 1st Sess., p. 1 (1963) and B. Ennis, Prisoners of Psychiatry, (1972) at vii).

<sup>20/</sup> See n. 17, above, Steadman and Felson, op. cit., Slobogin, op. cit.

<sup>21/</sup> See, e.g., "The demented, the deranged, mentally incompetent individual is a frequent purchaser"; "mental cases;" "the mentally deranged;" 114 Cong. Record 21812 (1968) (remarks of Rep. Schwengel); Id. at p. 22262 (remarks of Rep. Fisher); Id. at p. 21791 (remarks of Rep. Thompson).



references to the issue of mental illness — apart from references to the language of the bills themselves — is to those who are currently "mentally ill" or "mentally sick", <sup>22/</sup> "psychotics", <sup>23/</sup> "psychopaths", <sup>24/</sup> the "mentally or emotionally disturbed," <sup>25/</sup> "lunatics" and other similar terms seemingly referring to those presently mentally ill. <sup>26/</sup>

From the perspective of 1986 — 18 years of further mental health progress after those

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<sup>22/</sup> "the mentally ill"; "the mentally sick"; Id. at p. 22752 (remarks of Rep. Boland); Id. at p. 22750 (remarks of Rep. Reid).

<sup>23/</sup> Id. at p. 21838 (remarks of Rep. Lloyd).

<sup>24/</sup> Id. at p. 21835 (remarks of Rep. Schwengel); Id. at p. 23091 (remarks of Rep. Donahue).

<sup>25/</sup> Id. at p. 27420 (remarks of Sen. Cannon).

<sup>26/</sup> See, e.g., "lunatics"; "mentally irresponsible"; "mentally, morally and legally incompetent"; Id. at p. 22747 (remarks of Rep. McCarthy); Id. at 21780, (remarks of Rep. Sikes); Id. at p. 27152, (remarks of Sen. Dodd)

debates and hearings — the meaning and language of the legislators are still far from clear or precise. Again, what is clear is the legislators' difficulty in identifying a concise, ready-made catchall for the entire class of persons to be summarily declared perpetually disabled on "mental" grounds. <sup>27/</sup> Thus, the congressional

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<sup>27/</sup> From the quotes in the six foregoing footnotes, it is readily apparent that there is very little real consistency in the congressional language on this issue and certainly not the apparent agreement in congressional purpose suggested by the Government Brief's legislative citations, particularly at p. 31. Indeed, two of the quotations therein, 114 Cong. Rec. 13868 and 14773 (remarks of Sen Long) concern Title VII, not Title IV, of the Omnibus Crime Control and Safe Streets Act of 1968. Even the Government Brief's own choice of supporting legislative citations at p. 31 are to terms which vary widely from "mental disturbances" 114 Cong. Rec. 21829 (1968) ( remarks of Rep. Bingham) to the above quoted "psychopaths", Id. at p. 21835 (remarks of Rep. Gilbert), Id. at p. 21838 (remarks of Rep. Boland incorrectly attributed to Rep. Lloyd) and to "demented, deranged, incompetent individual," Id. at p. 21812 (remarks of Rep. Schwengel)

The earlier congressional hearings also betray a similar confusion about the class of persons intended to be prohibited from firearms

choice to exclude all persons who had ever been committed was not a rational one in the first instance, nor was its perpetual disqualification of that group. <sup>28/</sup> The legislative history of §925(c), as it pertains to the class of former patients, thus supports the district court's finding of a lack of rationality.

In its Brief, the Government argues, in

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ownership because of mental disabilities. See, e.g., Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 90th Cong. 1st Sess. (1967) "psychopaths"; p. 151 (statement of Sen. Hruska) p. 158 (statement of Sen. Robert Kennedy) "emotionally unstable persons"; p. 417 (statement of Sen. Church) "dangerous psychopaths".

<sup>28/</sup> Section 925(c) was based on the earlier administrative relief provision that had been enacted in 1965 to permit convicted individual or corporate felons to continue to conduct activities involving firearms. Pub. L. No. 89-184, 79 Stat. 788. The case in point, cited in the Senate Report, involved a corporation which had pled guilty to a non-firearms felony involving only its pharmaceutical division but which, absent the relief provision, would nevertheless thereby have lost its ability to deal in firearms through its weapons division. See Senate Report No. 666, 89th Cong. 1st Sess., 2-3 (1965).

support of the discriminatory statute, that, even if Congress were then in error, there is still sufficient justification for its discrimination against former patients:

Even if the rate of violent crime among those with a history of commitment is no higher than that among the general public, Congress justifiably may have believed that certain individuals with a history of mental illness are likely to commit especially violent offenses. Government Brief at 21-22 n.18.

Presumably then even such a mistake based on manifest prejudice and stigma would still pass equal protection muster under the Government's post hoc rationale. This apparent bias by Congress, however, is at the heart of the appellee's case, the district court's opinion (602 F.Supp. at 686, 690) and this amici brief. Because no hard studies or data on dangerousness and the mentally ill or former mental patients appear anywhere in the 1968 Act's legislative history, Congress - like the general public - apparently based its actions entirely on the widespread myths about the dangerousness of the

mentally ill and former mental patients. The total absence of any hard data in 1968, and the later studies and debate over the facts of dangerousness do not excuse Congress; rather they indict it for acting in haste and error.

#### 4. Government Officials As Predictors of Dangerousness

Similarly, there were - and are - no facts to support the Government's argument that federal law enforcement officials administering the Gun Control Act can predict future dangerousness of convicts but not former patients for firearms purposes. Government Brief, p.22, n.19. First, "parole and related proceedings" do not "routinely" involve issues of the possession vel non of deadly weapons. Moreover, the existing studies contradict the expertise of anyone to predict dangerousness, whether psychiatrist, BATF official, or parole officer. Indeed, the more recent studies also show that convicted felons are more likely to

commit offenses than are former mental patients.<sup>29/</sup>

#### 5. This Court's Preliminary Views of These Sections of The Gun Control Act

This Court has had several opportunities to comment in passing on the rationale for Congress' exclusions from firearms ownership.

<sup>30/</sup> None of these earlier opinions, however,

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<sup>29/</sup> See, e.g., Steadman and Felson, "Self Reports of Violence," 22 Criminology 321, at 340 (1984). See also Monahan and Steadman, "Crime and Mental Disorder," National Institute of Justice, Research in Brief, (Sept. 1984) at Implications: "The correlates of crime among the mentally disordered appear to be the same as the correlates of crime among any other group: age, gender, race, social class, and prior criminality . . . It does appear from the data that, if one could excise approximately half the population of state mental hospitals (those with prior arrest records) that the remaining patients upon their release would be no more criminal than the rest of us." (emphasis added)

<sup>30/</sup> As the court below noted (602 F. Supp. at 687-8), this Court referred to the challenged disabilities in its opinion in Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 116 (1983). This dicta is hardly controlling here however, as the lower court held. 602 F. Supp.



focused on the underlying history and lack of evidentiary support for the complete and unappealable exclusion of Galioto and his class.

31/ This Court and other courts have repeatedly

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at 687. Similarly inconclusive are this Court's previous passing references to these issues in Lewis v. United States, 445 U.S. 55, 65, n. 8 (1980), United States v. Batchelder, 442 U.S. 114, 119 (1979) Scarborough v. United States, 431 U.S. 563, 571-2 (1977), Barrett v. United States, 423 U.S. 212, 219-21 (1976), Huddleston v. United States, 415 U.S. 814, 824 (1974), and United States v. Bass, 404 U.S. 336, 345 (1971). Finally, in Adams v. Williams, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) it was suggested that psychiatric testing might be an appropriate gun control technique. See also Hardy and Stompoly, 51 Chi.-Kent L. Rev., above at p. 97 for other citations on this issue. Clearly, however, none of these cases are controlling precedent here.

In fact, to the extent that these cases concern the removal vel non of the felony disability, they only serve to reinforce the statutory disparity between convicted felons and committed mental patients. Unlike felons, patients cannot be "pardoned" either by states' governors or by the President. See 27 C.F.R. §178.142 (1982) and Dickerson v. New Banner, 460 U.S. at 114, n. 10 as to the "automatic enabling effect" of a Presidential pardon of a felon. "Expungement" under state law of patients' commitment and records obviously also does not suffice for patients under Lewis v. United States, 445 U.S. above, at 55.

31/ Id.

considered the parallel exclusion of felons and the sui generis procedures for their rehabilitation, particularly in the context of pardons and expungements. Again, as previously noted, the historical background of the felony exclusion and pardon provisions seems to have contributed in large part to the present statutory anomaly. 32/ Nevertheless, understanding the history and its almost random pattern neither excuses the discrimination nor provides a better, fairer rationale for future operations of the Bureau of Alcohol, Tobacco and Firearms under the statute.

#### 6. Summary

This Court should now affirm the opinion below because of the obvious fault in the statutory scheme. Whether examined as involving a "quasi-suspect" class or, in the alternative, under the rubric of a "fundamental

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32/ See n. 28 above.



right" or a "quasi-fundamental" right, the statute must fall as irrational. No one — least of all the amici — would urge the availability of firearms completely without reference to present mental illness. By providing for administrative relief, a hearing and/or an appeal process for former mental patients, the current Senate and House Bills, <sup>33/</sup> some existing state laws including New Jersey, <sup>34/</sup> and the modern English parallels <sup>35/</sup>

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<sup>33/</sup> S. 49, Sec. 105 and H.R. 945, Sec. 105, 99th Cong., 1st Sess.

<sup>34/</sup> The appellee was able to obtain relief under New Jersey's statutory provisions. 602 F. Supp., at 684. See Appendix "A" attached hereto for a table of state laws regarding mental illness and firearms licenses, and relief or appeals from denials of licenses, etc.

<sup>35/</sup> The Pistols Act, 1903, 3 Edw. 7 ch. 18, (this is the earliest English arms statute researched that specifically refers to mental illness) provided as follows: "Any person who shall knowingly sell a pistol to any person who is intoxicated or is not of sound mind shall be liable to a penalty. . . ."

The Firearm Act, 1920, 10 & 11 Geo. 5, ch. 43, Section 1 (2) required firearm certificates to be issued by the chief district police officer except "to a person whom the chief

have all adopted a more rational approach to the

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officer of police has reason to believe. . . to be a person of intemperate habits or unsound mind. . . ." Section (4) of the statute, however, also provided that "[a]ny person aggrieved by a refusal of a chief officer of police to grant him a firearm certificate. . . may appeal in accordance with rules made by the Lord Chancellor. . . ." Section 1(6) provided for revocation of the certificate of those of "unsound mind" and also for appeals therefrom. Section 5 provided penalties for anyone who shall "sell a firearm or ammunition to or repair, prove, or test a firearm or ammunition for any person whom he knows, or has reasonable ground for believing, to be drunk or of unsound mind."

The Firearms Act, 1937, 1 Edw. 8 and 1 Geo. 6, ch. 12. Section 2 (2) continued the earlier 1920 law denying issuance of gun certificates to persons of "unsound mind", Section 2 (7) provided for revocation of the licenses of persons of "unsound mind" and Section 2 (8) also provided for appeals by persons aggrieved by such denial or revocations. Finally, Section 20 continued the prohibition of sales, transfer, repairs and tests of firearms for or to persons of "unsound mind."

The Firearms Act, 1968, ch. 27. Section 25 prohibits selling, transferring, repairing, proving or testing firearms for or to persons of "unsound mind." Section 26 requires gun certificates and provides for appeals from denials of grants or renewals. Section 27 prohibits the granting of firearm certificate to persons of "unsound mind." Section 30 provides for revocation of the certificate of a person of "unsound mind" and for appeals

firearms - mental disability issue than the sections of the statute challenged here.

**B. THE JUDGMENT BELOW SHOULD BE AFFIRMED TO ENSURE EX-PATIENTS' FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS**

**1. The Fundamentality of the Right to Keep and Bear Arms**

It is the position of amici curiae that the decision below should now be affirmed by this Court because, inter alia, that decision ensures the fundamental rights of former mental patients to keep and bear arms. This rationale provides an independent basis for this Court's affirmance. Both the district court decision <sup>36/</sup> and the Government's Brief <sup>37/</sup> to this Court

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therefrom.

The Firearms Act of 1968, ch. 31 continues the provisions of the 1968 Act regarding firearms certificates, denials, revocations, appeals, and prohibition of sales (etc.) regarding persons of "unsound mind."

<sup>36/</sup> 602 F. Supp. at 686.

<sup>37/</sup> See the Government's Brief, at 28, n.24 regarding this issue and United States v. Miller, 307 U.S. 174 (1939). As will be more

skirt this critical issue in the case — the status

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fully discussed below, the "fundamentality" of the right to keep and bear arms is one of a number of issues not discussed in United States v. Miller.

In this part of its argument at p.28, n.24 (and also by implication at p.23-4, n.20), the Government's Brief attempts to distinguish, and thereby to minimize, the rights involved here as compared to the "essential" and "fulfilling" rights involved in J.W. v. Tacoma, 720 F.2d at 1129, and in City of Cleburne, 105 S.Ct at 3266 (Marshall, J. concurring in the judgment in part and dissenting in part). This argument completely misses the very point of having a written Bill of Rights in the first instance - the wording itself is an immutable guarantee of existing rights. Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897). James Madison, the framer of the Bill of Rights, viewed it as "calculated to secure the personal rights of the people so far as declarations on paper can." Quoted in Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment," 9 Har. J. of L. & Pub. Pol. at p. 25 (Summer 1986) (Tent. Draft, in press).

Just prior to making his remarks quoted above, Justice Marshall noted in Cleburne: "The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause." Surely that same logic applies to the "fundamentality" of rights guaranteed by the Second Amendment, "long cherished" and also widely deemed essential to "full participation in society." J.W. v. Tacoma, 720 F.2d above, at 1129. The district court here emphasized the point with its opening comments: "In a society which persists and insists in permitting its citizens to own and possess weapons . . . ." 602 F.Supp.

of the right to keep and bear arms as a "fundamental right" for the purpose of equal protection analysis of the statute.

This Court has long held that a right shall be deemed "fundamental" for this analysis only if it is "explicitly or implicitly guaranteed by the Constitution." San Antonio Ind. School District v. Rodriguez, 411 U.S. 1, 34 (1973). For the purpose of meeting such a standard, there could hardly be a more explicit guarantee than the Second Amendment guaranteeing the right to keep and bear arms:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to Keep and Bear Arms, shall not be infringed. <sup>38/</sup>

at 883 (emphasis added).

<sup>38/</sup> It is also clear that the states have their own special prerogatives in this area quite apart from the restrictions placed on the Congress by the Second Amendment. See Dred Scott v. Sandford, 60 U.S. 393, 450 (1857). The preamble to the Gun Control Act pointedly notes this difference in powers:

STATE FIREARMS CONTROL ASSISTANCE  
Purpose:

Sec. 101. The Congress hereby declares

By directing its attention, for equal

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that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title. Pub. L. No. 90-618, Title I, Sec. 101, 92 Stat. 1226.

As even the Government concedes (Government Brief, 4) appellee fully complied with New Jersey law and was duly granted a firearms purchaser identification card. See J.A. p. 12-14. The New Jersey statute, requiring a firearms purchaser identification card, N.J.S.A. 2C:58-3b, is limited to rifles and shotguns, clearly "arms" within the meaning of the 2nd Amendment. Andrews v. State, 50 Tenn. 165, 8 Am.Rep. 8 (1871). See also Dowlut and Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Okla. City U.L.Rev. 177, 194 (1982). In New Jersey, handguns are separately treated under N.J.S.A. 2C:58-3a (permit to purchase handguns), a permit for which Mr. Caliole did not make an application. Finally, Mr. Caliole was approved by his treating



protection purposes, largely to the parallel issue of the scrutiny of who may be denied the statutory right to keep and bear arms, the district court did not address the strict level of scrutiny also required by the nature of the fundamental constitutional right involved in this case.

Moreover, apart from explicit rights, beginning with its seminal decision in Skinner v. Oklahoma, 316 U.S. 535 (1942), this Court has traditionally also required strict scrutiny of statutes affecting fundamental rights, including the "penumbral" right of privacy and the "guardian" right of suffrage. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1964); Kramer v. Union Free School Dist., 395 U.S. 621 (1969). As Justice Brennan has noted:

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psychiatrist and, as a result, by the state court for his firearms card. See Youngberg v. Romeo, 457 U.S. 307, 321 (1982) regarding this Court's deference to the exercise of professional judgment and to the states' powers as well in other matters involving mental health issues.

The test of "fundamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. San Antonio Ind. School District v. Rodriguez, 411 U.S. at 62-63 (Brennan, J. dissenting).

This connection between the right involved here and the effectuation of other rights can be best demonstrated by the following historical perspective on the relationship between true citizenship and rights:

[I]t is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens . . . . [I]t would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they



went. Dred Scott v. Sandford, 60 U.S. 393, 416-17 (1857) (emphasis added). See also, Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204, 245-6 (1983); and Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 G.Mason U.L.Rev. 1, 16-17 (1981).

Thus, in Dred Scott, Chief Justice Taney reasoned in reverse from the states' stigmatization of slaves back to the conclusion that the rights of citizens could not be extended to those so stigmatized. By contrast, here the district court properly rejected the discrimination against former patients in the statute but without reaching the nature of the underlying right and its relation to "the security and protection of the liberties and rights" as described in Dred Scott. Other courts and commentators, however, have long and consistently noted the connection between the right to arms and the effectuation of other citizens' rights. See e.g. State v. Kessler, 289 Or. 359, 366-67, 614 P.2d 94, 97 (1980); State v.

Kerner, 181 N.C. 574, 107 S.E. 222, 224 (1921); Andrews v. State, 50 Tenn. 165, 183, 8 Am. Rep. 8,16 (1871); Nunn v. State, 1 Ga. (1 Kel.) 243 (1846). See also Shalhope, "The Ideological Origins of the Second Amendment," 69 J. of Amer. His. 599, 614 (1982).

Thus, on both bases — by explicit constitutional guarantee and also by its close nexus to other fundamental rights — the right to keep and bear arms is clearly entitled to the highest degree of judicial scrutiny.

The district court, however, by applying the lower "rational basis" test, demonstrated that, a fortiori, the challenged provisions of 18 U.S.C. §921 et seq. clearly failed both of the higher tests of "compelling" and "substantial" governmental interests. In further support of that conclusion by the district court, the amici will now provide this Court with the basis for determining that the right to keep and bear arms is "fundamental" according to the "traditions and

(collective) conscience of our people." Griswold v. Connecticut, 381 U.S. above, at 493 (Goldberg, J., concurring).

## 2. The History of the Right To Keep and Bear Arms

As a starting point, it must be emphasized that the Second Amendment guarantee of the citizen's right to keep and bear arms is just that — a guarantee of an acknowledged, pre-existing right — and not the grant of a new one. This Court has historically recognized that distinction as to the Bill of Rights generally <sup>39/</sup> and as to this right in particular. <sup>40/</sup>

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<sup>39/</sup> Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); See also Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 G. Mason U.L.Rev. 1, at 39-40 (1981).

<sup>40/</sup> Id. Specifically, the right being guaranteed thereby was the Englishman's individual right to keep and bear arms guaranteed by the 1689 English Bill of Rights, which provided as follows in its seventh article:

[T]he Subjects which are Protestants may

In its prior case law touching on the issue of the Second Amendment <sup>41/</sup>, this Court had not had the benefit of the most recent scholarship on the origins of the individual right to keep and bear arms. <sup>42/</sup> Thus, to the extent that Cruikshank, Miller, and Presser are even relevant here at all, their relevance is largely as to what issues they did not decide or even consider.

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have Arms for their Defence suitable to their Conditions, and as allowed by Law. 1 W. & M., Sess. 2, ch. 2 (1689). See Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment," 9 Harv. J. of L. & Pub. Pol at 15-26, 36-40 (Summer 1986) (Tent. Draft in press)

<sup>41/</sup> See United States v. Miller, 307 U.S. 174 (1939). See also, United States v. Cruikshank, 92 U.S. 542 (1876) and Presser v. Illinois, 116 U.S. 252 (1886).

<sup>42/</sup> See, in particular, Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," 10 Hastings Con. L.Q. 285 (1983) and Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment," 9 Harv. J. of L. and Pub Pol. (Summer 1986) (Tent. Draft, in press). See also, generally, the list of articles on the Second Amendment and the right to keep and bear arms, in Appendix "B" attached hereto.

Consequently, one of the issues before this Court for the first time in this case is the level of scrutiny to be applied to a statute affecting the right to keep and bear arms as a fundamental right guaranteed explicitly by the Constitution. None of the cases cited, nor any other legal authority on the issue, specifically addresses and definitively answers the question of the "fundamentality" and individual nature of the right to keep and bear arms reflected in the Second Amendment guarantee.<sup>43/</sup>

It is now clear that the Englishman's individual right to keep and bear arms was the very wellspring of the Second Amendment. <sup>44/</sup> It

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<sup>43/</sup> Id. Recent academic scholarship has documented the individual origins of that right with increasing conclusiveness. See also, Shalhope, "The Ideological Origins of the Second Amendment", 69 J. of Amer. His. 599 (1982).

<sup>44/</sup> See, for an excellent tracing of that history, S. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (Univ. of New Mexico Press, 1984). See also, for a shorter version of that history, Halbrook, "To Keep and Bear Their Private Arms: The Adoption

is that individual right — extant more than a century before 1789 — which must be the constitutional touchstone for determining the "traditions and (collective) conscience of our people" <sup>45/</sup> with regard to the "fundamentality"

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of the Second Amendment, 1787-1791", 10 N. Ky. L. Rev. 13 (1982).

Because of this new research -- notwithstanding the several "myths" about the meaning of the Second Amendment -- the issue of the English and American individual right to keep and bear arms vel non can now be readily distinguished from the issue of the right to bear specific types of arms in rationale and case law. See e.g. Malcolm, 10 Hasting Const. L.Q. above at 306, thoroughly documenting the English Bill of Rights' "individual" right to arms as a reaction to royal attempts to disarm Protestants, refuting Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," 2 Hastings Const. L.Q. 961 (1974) ("It should be pointed out that the King did not disarm Protestants in any literal sense . . . .") Id. at 973. See also Hardy, 9 Harv. J. of L. and Pub. Pol. above at 15-26, and Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204 (1983) refuting the exclusivity of the right to the state's militia as earlier described in Feller and Gotting, "The Second Amendment, A Second Look," 61 Northwest U.L. Rev. 46 (1966).

<sup>45/</sup> See Griswold v. Connecticut, 381 U.S. above, at 493 (Goldberg, J., concurring). See also, Halbrook, "The Right to Bear Arms in the First State Bills of Rights: Pennsylvania,



of this right for equal protection purposes and the level of scrutiny required here.

Given the nature of English society, however, the Englishman's right to keep and bear arms was not absolute. The right, it has been suggested, was not extended to the legally disabled: felons or the young. <sup>46/</sup> Finally, and most relevantly, a traditional disability extended to the "lunatics" or "idiots" <sup>47/</sup>. The English

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North Carolina, Vermont and Massachusetts," 10 Ver. L. Rev. 255, at 284 and 300 (1985) regarding the English right to bear arms as a source for the federal and states' rights.

<sup>46/</sup> See Dowlut, "The Right to Arms: Does the Constitution or the Predilection of Judges Reign?", 36 Okla. L. Rev. 65, 96 (1983).

<sup>47/</sup> See, e.g., Dowlut and Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Okla City U.L.Rev. 177, 191, n. 71 (1982). See also, Dowlut, 36 Okla. L.Rev. at 96 and Malcolm, 10 Hastings L.Q. at 310.

In addition to restrictions on those suffering from mental illness, as with other subjects of discrimination, the right to bear arms was also a prerogative earlier withheld from various racial, religious and ethnic groups. See S. Halbrook, That Every Man Be Armed: The Evolution of A Constitutional Right, (1984) at 107 et seq. (blacks); at 234, n.5 (native American Indians) and Halbrook, "What

legal tradition, however, is also clear that the legal disability of at least one part of the mentally disabled class, "lunatics," was not to be considered perpetual, as it is under the statute challenged here. <sup>48/</sup> Indeed, modern English

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the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms,'" 49 L. & Contemp. Prob. 401, 406 (1986) (in press) (Reconstruction era firearms restrictions on "any negro, mulatto or other person of color"). See also Caplan, "The Right of the Individual to Bear Arms: A Recent Judicial Trend," 1982 Det. Col. L. R. at 794, (re: the 1181 English Statute of Assize of Arms prohibiting arms possession by Jews) and Malcolm, 10 Hastings L.Q. above, at 306-7, and Hardy, 9 Harv. J. of L. and Pub. Pol. above, at 15-26, concerning discrimination against Catholics and Protestants regarding the English right to arms.

<sup>48/</sup> See, e.g., 1 W. Blackstone, Commentaries, 317-317 (E. Christian ed. London, 1793-95) ("For the law always imagines that these accidental misfortunes may be removed. . . ([T]he king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind. . . . On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason. . . ."); 4 W. Blackstone, Commentaries 25 ("It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses. . . .") See also, An Act concerning the Prerogative of the King in the



parallels continue to provide both for firearms disabilities based on mental illness and for

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Preservation of the Lands of Lunaticks, 17 Edward II, st. 2, ch. 10:

Also the King shall provide, when any (that before time both had his wit and memory) happen to fail of his wit, as there are many per lucida intervalla, that their lands and tenements shall be safely kept without waste and destruction. . . to be delivered unto them when they come to right mind. . ."; (emphasis added).

A. Highmore, A Treatise on the Law of Idiocy and Lunacy (London, 1807):

Yet in the eyes of the law, a lunatic is never to be looked upon as desperate, but always at least in a possibility of recovering. . . . (p. 65) "A lunatic is never to be looked upon as irrecoverable. . . ." (p. 105);

J. Brydall, Non Compos Mentis, or the Law Relating to Natural Fools, Mad-Folks and Lunatick Persons, (London, 1700) at p. 68:

"[U]nless, the Testator were besides himself, but for a short time. . . not continually for a long space, as for a month or more; or unless the Testator fell into some Frenzy upon some accidental cause which cause is afterwards taken away, or unless it be a long time since the testator was assaulted with the Malady; for in these cases the Testator is not presumed to continue in his former Furor, or Frenzy." (Emphasis added).

opportunities for removal of such firearms disabilities. <sup>49/</sup> Thus, even if the English legal tradition has long-acknowledged the reality of both temporary and long-term mental disability, it has also recognized the need for providing an opportunity for the recovery and rehabilitation of the formerly mentally ill as to their fundamental rights.

### 3. The Right to Keep and Bear Arms As A "Quasi-Fundamental Right"

Even if arguendo, this Court were to conclude that, despite the Second Amendment and its close relationship to other fundamental rights, the right to keep and bear arms is not, strictly speaking, a "fundamental right" for equal protection purposes, there is yet another alternative ground for requiring a higher or

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<sup>49/</sup> See Part III A above for a discussion of modern English firearm statutes as they relate to mental disability and appeals from denials of firearms certificates on that basis.

intermediate level of scrutiny of the statute involved here. It has been suggested<sup>50/</sup> that this Court has adopted a "continuum" or "spectrum" of scrutiny for various rights and interests, ranging from the fundamental rights already described above to other rights not specifically traceable or even directly implicated by constitutional provisions, or so-called "quasi-fundamental rights."<sup>51/</sup>

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<sup>50/</sup> See, e.g., Comment, "Plyler v. Doe: the Quasi Fundamental Right Emerges in Equal Protection Analysis", 19 N. Eng. L. J. 151 (1982-84); Hutchinson, "More Substantive Equal Protection? A Note on Plyler v. Doe," S. Ct. Rev. 167 (1982); J.W. v. City of Tacoma, 720 F.2d 1126, 1128 (9th Cir. 1983):

The legislative classification at issue in Plyler affected a group that was not a suspect class and did not impinge on a fundamental right. Because, however, the affected group possessed some of the characteristics of a suspect class, and the benefit denied to the group was, if not fundamental, important, the Court concluded that heightened scrutiny was appropriate. (Emphasis added).

<sup>51/</sup> Id., See also, San Antonio Ind. School District v. Rodriguez, 411 U.S. at 62-63 (Brennan, J., dissenting) and at 102-03 (Marshall, J., dissenting); City of Cleburne v.

Given the historical and philosophical background of the right to keep and bear arms<sup>52/</sup> — quite apart from its constitutional textual and legal foundations — this Court should now equate this right with other quasi-fundamental rights, such as education, as a bare minimum for

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Cleburne Living Center, 105 S. Ct. 3249, 3260-1 (1985), (Stevens, J. and Burger, C.J. concurring) and at 3265 (Marshall, J., dissenting).

<sup>52/</sup> For many Americans, the right of access to firearms is as "fundamental" or "essential" to being recognized as an adult citizen as are voting, driving, or working. J. Wright, P. Rossi, and K. Daly, in Under the Gun, at p. 323, (1983) note that, "There are several strands of evidence uncovered in our review to support the assertion that a strong subcultural theme in American life centers around the ownership and use of guns . . . In much of small town and rural America, the rites of passage from childhood to adulthood may include that a father train his son in the use and care of small arms." Also the vast majority of Americans believe they have a constitutional right to own a gun. Id. at 20, 238. In this regard, American culture parallels other and earlier Western societies. See, e.g., Gardiner, "To Preserve Liberty - A Look at the Right to Keep and Bear Arms," 10 N.Ky. L. Rev. 63, 67 n.17 (1982) (Anglo-Saxon serf manumission ceremonies). See also J. McPhee, La Place de la Concorde Suisse, 41 (1984): "In Appenzell, men still carry swords when they turn out to vote."

determining the appropriate level of scrutiny required. Again, as with the "fundamental rights" analysis above, the application of even the minimally heightened level of scrutiny, heretofore associated with such "quasi-fundamental" rights as public education, must also inevitably result in this Court's rejection of the statutory sections involved herein because of their complete lack of any rationale basis.

#### 4. Summary

Thus, quite apart from whether or not this Court should adopt an equal protection analysis based on the "quasi-suspect" class issue, the statute would clearly fail the higher levels of scrutiny required by this Court's recognition of either the "fundamental" <sup>53/</sup> or "quasi-fundamental" nature of the former patient's

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<sup>53/</sup> "The right to defend oneself from a deadly attack is fundamental." United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) (implying that a citizen has a right to keep and bear arms in order to make this right effective).

constitutional right to keep and bear arms.

#### CONCLUSION

Based on the foregoing, amici curiae respectfully urge this Court to affirm the judgment of the District Court below.

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\* Counsel gratefully acknowledges the assistance of J. Benedict Centifanti, Law Clerk, in the preparation of this Brief.

## **APPENDICES**



## APPENDIX A

STATE FIREARMS STATUTES REGARDING  
MENTAL DISABILITIES AND  
REHABILITATION

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ALABAMA Code of AL § 13A-11-76	Delivery of pistol prohibited to persons of unsound mind
ARIZONA * AZ Rev. Stat. Title 13 § 13-3101 (5) (a)	Possession of weapon prohibited for person found to constitute a danger to himself/others pursuant to court order and whose court ordered treatment has not been terminated by court order
ARKANSAS AR. Stat. Ann. § 41-3103 (b)	Possession of firearm prohibited for person adjudicated mentally defective
CALIFORNIA Welfare & Institutions Code § 8100	Possession of firearm prohibited for person who is a patient in a mental hospital
Penal Code § 12072 & Welfare Code § 8101	Sale or transfer of firearm prohibited for person who is a patient in a mental hospital
DELAWARE * DE Code Ann. Title 11 § 1448	Weapon possession prohibited for person committed to hospital for mental disorder unless he possesses certificate from doctor stating that he no longer suffers from the mental disorder
WASH. D.C. * D.C. Code Title 6 § 6-2313 (6)	No firearms registration certificate shall be issued to person who within the last 5 years was confined to a mental hospital provided he can present medical certification that he has recovered

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\* States with provision for relief from disability.

## 2a

D.C. Code Title 22 § 22-3207	Sale of pistol to person of unsound mind prohibited
FLORIDA * FL Stat. Ann. Chapter 790 § 790.06 (3)	No license to carry concealed will be issued to person adjudged mentally incompetent unless that person possesses a certificate from a doctor stating he no longer suffers from that disability.
FL Stat. Ann. Chapter 790 § 790.17	Furnishing of weapon to person of unsound mind prohibited
FL Stat. Ann. Chapter 790 § 790.25 (2) (b) (1)	Possession of firearm prohibited for person of unsound mind
GEORGIA * Off. Code of GA Ann. § 16-11-129 (b) (4)	No license to carry a pistol will be issued to a person hospitalized in a mental hospital in the last 5 yrs unless probate judge decides circumstances surrounding the hospitalization not sufficient to deny the license
ILLINOIS IL Stat. Ann. Title 38 § 24-3 (e) & (f) § 24-3.1 (5) & (6)	Sale of firearm to and possession of firearm by person of unsound mind prohibited
IL Stat. Ann. Title 38 § 83-8 (e)	Application for a firearm owner's identification card denied to person who has been mental patient in last 5 yrs
INDIANA IN Stat. Ann. § 35-23-4.1-6	Sale or transfer of handgun to person of unsound mind prohibited
IOWA IA Code Ann. § 724.10	Application for permit to carry asks if person has history of mental illness
LOUISIANA LA Rev. Stat. Ann. § 28.183	Furnishing a weapon to a patient of a mental institution prohibited

\* States with provision for relief from disability.

## 3a

MAINE ME Rev. Stat. Ann. Title 25 § 2032 (C) (6) (e)	Application for permit to carry concealed asks if person ever committed to mental institution
MARYLAND Ann. Code of MD Article 27 § 445 (b) & (c)	Sale or transfer to and possession by person of unsound mind prohibited
MASSACHUSETTS * MA Gen. Laws Ann. Chapter 140 § 129 (B) (b)	Prohibited from obtaining application for firearms identification card if ever confined to mental institution unless he can submit an affidavit from a doctor stating disability won't affect firearm possession
MICHIGAN MI Compiled Laws § 28.422 (1)	No pistol license will be issued to person adjudged insane
MINNESOTA * MN Stat. Ann. § 624.713 (c)	Possession of pistol prohibited for mentally ill person unless he possesses a certificate from a doctor stating that he is no longer suffering from that disability
MISSISSIPPI MS Code Ann. § 49-7-19	Unlawful to issue a hunting license to person who is mentally unfit
MISSOURI Ann. MO Stat. § 571.090 (1) (6)	Permit to acquire firearm denied if adjudged mentally incompetent
Ann. MO Stat. § 571.070 (2)	Possession of a concealable firearm prohibited for person adjudged mentally incompetent
NEW JERSEY NJ Stat. Ann. Title 2C Chapter 39 § 2C:39-7	Possession prohibited for person committed to mental institution unless he possesses a certificate from doctor stating that he no longer suffers from that disability

\* States with provision for relief from disability.

## 4a

NJ Stat. Ann. Title 2C Chapter 58 § 2C:58-3(c) (3)	Permit to purchase handgun denied to person who has ever been confined for a mental disorder unless he possesses a certificate from a doctor stating that he is no longer suffering from that disability
NEW YORK Con. Laws of NY Ann. Penal Law § 265.00 (16)	Definition of person not suitable to possess firearms includes persons adjudicated mentally incompetent
NORTH CAROLINA Gen. Stat. of NC § 14-258.1 (a)	Furnishing weapon to mental patient prohibited
NORTH DAKOTA ND Cent. Code Title 62 § 62-01-04 (2)	Possession of pistol prohibited by person who is emotionally unstable
OHIO * OH Rev. Code Ann. § 2923.13 (A) (5)	Possession of firearm by person adjudged mental incompetent is prohibited unless he is relieved from disability under § 2923.14
OKLAHOMA OK Stat. Ann. Title 21 § 1289.10	Furnishing of firearm to mentally incompetent prohibited
PENNSYLVANIA PA Stat. Ann. Title 50 § 4605 (2)	Furnishing a weapon to a person committed to a mental institution prohibited
RHODE ISLAND * Gen. Laws of RI Title 11 Ch. 47 § 11-47-6	Possession of firearm by mental incompetent prohibited, however, he may make an application to purchase if he has been out of confinement for 5 yrs and can present affidavit from doctor
SOUTH CAROLINA Code of Laws of SC § 16-23-30 (a)	Delivery of pistol to person adjudicated mental incompetent is prohibited

\* States with provision for relief from disability.

## 5a

TENNESSEE TN Code Ann. Title 39 Ch. 6 § 39-6-1704 (b)	Sale of firearms to person of unsound mind prohibited
TN Code Ann. Title 33 § 33-317 (b)	Furnishing weapons to patients of mental institutions prohibited
UTAH UT Code § 76-10-503 (1)	Possession of firearm by mental incompetent prohibited
WASHINGTON Rev. Code of WA Ann. Title 9 § 9.41.080	Delivery of pistol to person of unsound mind prohibited
WEST VIRGINIA WV Code § 27-12-3	Transfer of firearm to a patient in a mental institution prohibited



TABLE OF STATE FIREARMS STATUTES  
REGARDING MENTAL DISABILITY

STATES WITH NO STATUTES: STATES WITH PROVISIONS FOR  
RELIEF FROM DISABILITY:

Colorado	Arizona
Connecticut	Delaware
Idaho	Washington, D.C.
Kansas	Florida
Kentucky	Georgia
Montana	Massachusetts
Nebraska	Minnesota
Nevada	New Jersey
New Hampshire	Ohio
New Mexico	Rhode Island
Oregon	
South Dakota	
Texas	
Vermont	
Virginia	
Wisconsin	
Wyoming	

STATES WITH STATUTES REGARDING PROHIBITIONS  
ON WEAPONS/FIREARMS

DELIVERY/TRANSFER SALE/FURNISHING	POSSESSION	DENIAL OF LICENSE/PERMIT/ APPLICATION/FOID *
California	Arizona	Washington, D.C.
Florida	Arkansas	Florida
Illinois	California	Illinois
Louisiana	Delaware	Iowa
Maryland	Florida	Maine
North Carolina	Maryland	Massachusetts
Oklahoma	Missouri	Mississippi
Pennsylvania	New Jersey	Missouri
Tennessee	New York	
West Virginia	Ohio	
Rhode Island		
Utah		

STATES WITH STATUTES REGARDING PROHIBITIONS  
ON HANDGUNS/PISTOLS

DELIVERY/TRANSFER SALE/FURNISHING	POSSESSION	DENIAL OF LICENSE/PERMIT/ APPLICATION/FOID *
Alabama	Minnesota	Georgia
Washington, D.C.	North Dakota	Michigan
Indiana		New Jersey
South Carolina		
Washington		

\* Firearm owner's identification card.

## APPENDIX B

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